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Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice

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DISCRETION MUST BE CONTROLLED, JUDICIAL AUTHORITY CIRCUMSCRIBED, FEDERALISM PRESERVED, PLAIN MEANING ENFORCED, AND EVERYTHING MUST BE SIMPLIFIED: RECENT SUPREME COURT CONTRIBUTIONS TO FEDERAL CIVIL PRACTICE

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INTRODUCTION

During the 1989-90 term, the Supreme Court decided a number of cases that will have significant impact on federal civil practice. The cases cover all areas of civil practice, from standing to the right to jury trial to post-judgment interest. It cannot be contended fairly that the cases are part of some agenda. Nevertheless, several analytical strains, grounded in judicial conservatism, have been made either the grounds for decisions or have laid the groundwork for future decisions. These analytical strains do not all appear in one case, but they are interwoven through the large body of Supreme Court cases that affect federal civil practice. The following strains are evident:

1. Discretion must be controlled. The Court showed significant concern about the limits of official discretion, especially in civil rights cases. These concerns were expressed both as to the district court's exercise of its remedial powers, and as to a state official's exercise of unbridled discretion.

2. Judicial authority must be fairly circumscribed. Several of the opinions in the 1989-90 term, both in the majority and the dissent, showed a concern that the courts would overstep the bounds of judicial decisionmaking. To allay their concerns, the Justices looked for limits in tradition, deference to the legislature, an invigorated standing doctrine, and controls on case management.

3. "Our Federalism" must be preserved. The Court's concern with "Our Federalism"[1] was evident in cases addressing the scope of the federal court's injunctive power against local officials and en-

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1. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 25 (1989) (Stevens, J., concurring) (concluding that the majority's interpretation of the eleventh amendment codified a notion of "Our Federalism").

tities,[2] the Tax Injunction Act,[3] and waiver of eleventh amendment sovereign immunity by a bi-state agency.[4]

4. Plain meaning must be enforced. The Court's strict adherence to the plain meaning of a statute was decisive in more than one case. In *Northbrook National Insurance Co. v. Brewer*,[5] even though application of the plain meaning rule produced an illogical result, the result was not so absurd as to overcome the rule. In *Pavelic & LeFlore v. Marvel Entertainment Group*,[6] the Court gave rule 11 of the Federal Rules of Civil Procedure a "plain meaning" application. And in *Hallstrom v. Tillamook County*,[7] the Court applied the plain meaning rule to a statute requiring sixty days' notice before commencement of suit and found that dismissal was mandatory if the requirement had not been met.[8] Related to the plain meaning doctrine is the Court's disinclination to rely on legislative history.[9]

5. Everything must be simplified. Especially in concurring opinions, the Justices pushed for simplification of long-uninvestigated analytical constructs. Justices urging simplification correctly noted that for issues of civil practice, especially preliminary issues such as jurisdiction, simplification is essential so that parties know where to go and what to do at the outset of litigation.

The emphasis on these five analytical strains, all with the view toward a model of a limited judiciary, reflects Justice Scalia's continuing influence on the Court.[10] In the area of federal civil practice, it is fair to state that Justice Scalia wrote the most influential and powerful opinions during the 1989-90 term. In many cases, he stressed fundamental problems that other Justices had carefully elided. Often he sought to clarify and simplify long-applied tests that have become burdensome and confusing. Undoubtedly, Justice Scalia's head-on style of jurisprudence will continue to have significant effect in federal civil practice and elsewhere.

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2. *See* Spallone v. United States, 110 S. Ct. 625 (1990); *infra* text accompanying notes 13-38; Missouri v. Jenkins, 110 S. Ct. 1651 (1990); *infra* text accompanying notes 39-74.

3. *See* Franchise Tax Bd. v. Alcan Aluminum Ltd., 110 S. Ct. 661 (1990); *infra* text accompanying notes 75-83.

4. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 110 S. Ct. 1868 (1990); *infra* text accompanying notes 84-109.

5. 110 S. Ct. 297 (1989); *see infra* text accompanying notes 118-126.

6. 110 S. Ct. 456 (1989); *see infra* text accompanying notes 559-572.

7. 110 S. Ct. 304 (1989); *see infra* text accompanying notes 371-373.

8. *See id.* at 311.

9. *See* Yellow Freight Sys. v. Donnelly, 110 S. Ct. 1566 (1990); *infra* text accompanying notes 186-196.

10. *See* Fein, *Scalia's Way*, 76 A.B.A. J. 38 (1990).

This Article analyzes and considers the implications of the 1989-90 term on all areas of federal civil practice. Part I considers the relation of the federal courts and the states. Part II considers federal subject matter jurisdiction. Part III investigates personal jurisdiction and the landmark case *Burnham v. Superior Court*.[11] Part IV examines the cases on justiciability. Part V considers federal procedural developments. Part VI is concerned with the right to a jury trial. Part VII deals with the major case of *Zinermon v. Burch*,[12] which will have substantial impact on civil rights litigation in the federal courts. Finally, Part VIII analyzes the cases dealing with the practice of attorneys in federal courts, including rule 11 and statutory awards of attorney's fees.

I. FEDERALISM: THE RELATION OF THE FEDERAL COURTS AND THE STATES

In the 1989 term, the Supreme Court decided four cases that addressed the problem of federalism. The cases cover several specific issues and indicate generally that the Court was and is concerned with the limits on judicial discretion that are necessary to preserve federalism and comity.

A. Abuse of Discretion in Providing a Remedy for Discrimination: Spallone v. United States[13]

After extensive litigation and a finding that the City of Yonkers was guilty of housing discrimination,[14] the parties entered into a consent decree, which was approved by the city council and entered by the district court.[15] The decree provided that the City, through its elected council, would adopt an ordinance to implement a plan to build low-income housing in predominantly white sections of Yonkers. The individual city council members, whose votes were required to effectuate the consent decree, were not parties to the litigation. Confronted with public opposition to the consent decree,

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11. 110 S. Ct. 2105 (1990); *see infra* text accompanying notes 197-224.

12. 110 S. Ct. 975 (1990); *see infra* text accompanying notes 495-536.

13. 110 S. Ct. 625 (1990).

14. *Id.* at 628 (citing United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1369-71 (S.D.N.Y. 1985)). The district court found that the City of Yonkers had consistently acted to concentrate minority citizens in predominantly black southwest Yonkers, in order to preserve the nearly all-white composition of east Yonkers. *Yonkers*, 624 F. Supp. at 1371.

15. *Spallone*, 110 S. Ct. at 629.

the city council balked at promulgating the promised legislation.[16] Ultimately the city council passed legislation declaring a moratorium on public housing construction.

When it became apparent that the City would not comply with the consent decree, the district court entered an order requiring the City to adopt the "legislative package" set forth in the consent decree, or else the City and the council members would be held in contempt.[17] Despite the threat of contempt, the council members defeated a resolution of intent to adopt the legislative package; as a result, the court imposed contempt fines on both the City and each recalcitrant city council member.

Chief Justice Rehnquist, writing for a five-person majority, held that the district court abused its discretion under traditional principles of equity in fining the individual council members.[18] The Court based its conclusion on two factors: (1) that fining individual council members for refusing to vote to implement the consent decree was an extraordinary and intrusive remedy which, if ever proper, could be used only as a last resort, especially where the legislator is not even a party to the litigation; and (2) that fining the City alone was reasonably likely to accomplish the desired result.[19]

The Court began with the proposition that even though the federal court has broad equitable powers to remedy state and local discrimination, such powers are not unlimited: "[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . . ."[20] Thus, the use of a remedy that is "overkill" will be an abuse of discretion. The question in *Spallone* was whether fining the individual council members was overkill in light of the fact that the City was also fined.

The Court found that it was reasonably probable that fining the City would effectuate compliance with the consent decree because:

1. The City was faced with dire financial consequences, including layoffs and bankruptcy, for failing to comply with the court order.[21]

2. Previously, the City had capitulated with respect to a remedial order when faced with contempt fines: the district court had

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16. *Id.* at 638 (Brennan, J., dissenting). The council, among other things, attempted to void the consent decree on the ground of mutual mistake. *Id.*

17. *Id.* at 630.

18. *See id.* at 631.

19. *See id.* at 633.

20. *Id.* at 632 (quoting Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)).

21. *Id.* at 633.

ordered the City to accept funds to build public housing, and the city council eventually had passed a complying resolution when threatened with contempt.[22]

3. The Court noted that it was the City, and not the council members, who eventually capitulated in the instant litigation, when City services were deteriorating due to the contempt fines.[23]

The Chief Justice stressed that the use of contempt fines to force a legislator to vote in favor of implementation of the discrimination plan was an extraordinary remedy that should be used only as a last resort—especially where the legislator is not even a party to the litigation.

The Court did not decide the question left open in *Tenney v. Brandhove*[24] and *United States v. Gillock*[25]—of whether the principle of legislative immunity was applicable to local legislators.[26] However, the majority did state that the principles of the immunity doctrine must inform the use of the contempt power. This appears to be a stretch, given the fact that *Tenney* was a case concerning civil liability in a private action, not a case where the legislator was acting in defiance of a federal court order. *Gillock* seems more analogous to the situation presented in *Spallone*. In *Gillock*, the Court found that state legislators were not protected by legislative immunity in federal criminal prosecutions.[27]

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22. *Id.*

23. *See id.* As to this last point, the Court was engaging in 20-20 hindsight, which is arguably inappropriate in determining whether a district court abused its equitable discretion.

24. 341 U.S. 367, 376-79 (1951) (state legislators were absolutely immune from civil liability when acting in the sphere of legitimate legislative activity); *see also* Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979) (absolute immunity granted to state and federal legislators in civil cases extended to protect regional legislators).

25. 445 U.S. 360, 373 (1980) (state legislators enjoy no evidentiary privilege as to legislative acts in federal criminal prosecutions).

26. *See Spallone*, 110 S. Ct. at 636.

27. *See Gillock*, 445 U.S. at 373. Lower courts have held that local legislators have absolute immunity arising out of their legislative acts. *See, e.g.*, Healy v. Town of Pembroke Park, 831 F.2d 989, 993 (11th Cir. 1987) (affirming the district court's holding that when the mayor and commissioner voted to contract for police services, resulting in the termination of the plaintiffs' (police officers') jobs, the mayor and commissioner were acting in a legislative capacity and were immune from liability); Aitchison v. Raffiani, 708 F.2d 96, 99-100 (3d Cir. 1983) (the mayor, the council, and the borough attorney were acting in a legislative capacity when they voted to abolish the plaintiff's position of assistant building inspector, and were immune from damage suits); Hernandez v. City of Lafayette, 643 F.2d 1188, 1191-92, 1194 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (when the mayor vetoed an ordinance that would have rezoned plaintiff's property, the mayor was performing a legislative function and was immune from personal liability). Even if there is absolute legislative immunity for local officials,

Regardless of the precise parameters of legislative immunity, the Court in *Spallone* held that individual contempt fines are extraordinary and should be applied rarely, because they are uniquely intrusive into the local political process.[28] A direct fine is particularly extreme since it creates a conflict for legislators. They must vote for their own self-interest rather than that of the City. This "effects a much greater perversion of the normal legislative process" than does fining the City.[29] When the City is fined, the legislator who votes to comply with the court order may be doing something that he does not want to do (for example, capitulating to integration), but it is for the City's financial good, not his own. That kind of choice is not as personal, and is made by legislators every day. Nevertheless, the *Spallone* Court did leave open the possibility that individual contempt fines could be used as a last resort in an extraordinary case. Yet *Spallone* was not such a case, given the likelihood that fining the City would accomplish the intended result.

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented. The central point of the dissent is that the Court gave insufficient deference to the trial judge.[30] According to the dissenters, it was not appropriate for the Supreme Court to make different choices in hindsight, to second guess district courts, to play "district court for a day."

In the dissent's view, Judge Sand used extreme caution before imposing the direct sanctions on the council members. He considered alternative means and alternative plans.[31] Justice Brennan dis-

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however, a line must be drawn between the legislative and the administrative actions. Courts generally employ a functional analysis to make this distinction. *See, e.g.*, Forrester v. White, 484 U.S. 219, 229 (1988) (using the functional approach to determine that an employment decision made by a judge did not give rise to judicial immunity); *Aitchison*, 708 F.2d at 99 (looking at the functions of the mayor and the borough attorney to determine if they constituted legislative functions); Bryant v. Nichols, 712 F. Supp. 887, 889, 891 (M.D. Ala. 1989) (the city council acted in an administrative or managerial capacity when it voted to transfer and demote the plaintiff).

28. *See Spallone*, 110 S. Ct. at 635.

29. *Id.* at 634.

30. *See id.* at 640 (Brennan, J., dissenting).

31. *Id.* Rule 70 of the Federal Rules of Civil Procedure allows a federal court in the exercise of equitable powers to "deem" something done. FED. R. CIV. P. 70. Could this have been used to effectuate the remedial order in *Spallone*? The district court found rule 70 to be insufficient, and that conclusion was rightfully not challenged by the Supreme Court. Under the circumstances in *Yonkers*, an order pursuant to rule 70 would not have been sufficient, since at some point, the city council would have had to become involved in the plan implementation, and builders and developers would certainly have been concerned about risking money on a project that was "deemed" to have been approved. The district court would have had to do a lot of "deeming" in order to implement the consent decree.

puted the majority's argument that fining the City was, as of the time the contempt orders were entered, reasonably probable to reach the intended goal, or at least not so obviously probable that fining the individuals as well was an abuse of discretion. Justice Brennan stressed the following points that the district court was entitled to have taken into account:

1. Fining the City would not have prevented council members from courting political martyrdom and playing "chicken" with each other regarding which council members would capitulate to save the City from bankruptcy—especially given voter opinion that it would be better for the City to go into bankruptcy than to integrate.[32]

2. The council's offers to give back millions of dollars of housing money, and the need for prior contempt fines to get the City to accept such funding, made it clear enough to the district court that the council members had lost all sense of civic responsibility.[33]

3. The attorney for the City argued persuasively in district court that the City was not the real culprit and thus that fining the City itself, which threatened municipal bankruptcy, would be inappropriate and unlikely to compel the desired result.[34]

Most important, Justice Brennan contended that the district court reasonably could have believed that imposing personal fines as a supplement would help to speed up compliance—even though fining the City ultimately may have been effective. The problem presented in Yonkers was not only ultimate compliance, but prompt compliance. In this respect, imposing a fine on the City arguably may have been less productive than imposing personal fines on council members, because it would leave the City less funds with which to implement the integration plan.

The dissent also attacked the majority's reliance on the penumbras of legislative immunity. According to Justice Brennan, the majority's argument that a direct fine is a perversion of the legislative process was inapposite, because at this point in the Yonkers litigation, the legislative process was purely ministerial. Legislative immunity considerations are not applicable where the council member has no choice but to comply with an order correcting an unconstitutional condition.[35]

Although the majority stressed that the council members were

32. *Id.* at 641.
33. *Id.* at 642.
34. *Id.* at 641-43.
35. *Id.* at 645.

not parties to the action, it did not base its decision on this factor, but merely used it to emphasize the intrusiveness of the district court's order.[36] As Justice Brennan pointed out, however, nonparty status would provide no defense to the individual contempt fines imposed here, given the council members' extensive participation in the litigation, and the notice conferred by the contempt order.[37] Nonetheless, after *Spallone*, courts are required to use more caution before issuing contempt orders against nonparties.

Implications of Spallone.—*Spallone* implies that the Supreme Court will be more inclined to intervene when personal sanctions are imposed directly against state and local officials to remedy discrimination than when fines are imposed against the governing entity itself. It is hard to justify the majority's opinion as a proper application of traditional abuse of discretion standards. Certainly the Court drew a fine line when it upheld the fine on the City, but rejected the fine on the council members. A fine on the City is every bit as intrusive as a fine on the council members; it essentially coerces a vote from the council, and does indirectly what the Supreme Court said could not be done directly. *Spallone* also cautions district courts not to intrude on the political process in remedying discrimination even though this expression of caution does not appear consistent with *Missouri v. Jenkins*.[38]

B. *Taxation as a Remedy for Discrimination:* Missouri v. Jenkins[39]

The district court in *Jenkins* found that the Kansas City School District and the State had operated a segregated school system.[40] The school district had not contested this issue, and had in fact brought the litigation together with a class of students, but was then realigned as a defendant.[41] The district court ordered that virtually all of the schools in the school district be converted into "magnet" schools[42]—as opposed to the more traditional method of having only some magnet schools to encourage movement within the district. The stated goal was to make the entire district attractive

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36. *See id.* at 632-33.

37. *Id.* at 647 n.14 (Brennan, J., dissenting).

38. *See id.* at 634; *see also* 110 S. Ct. 1651 (1990).

39. 110 S. Ct. 1651 (1990).

40. *Id.* at 1656 (citing Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984)).

41. *See* Jenkins v. Missouri, 593 F. Supp. 1485, 1487 (W.D. Mo. 1984) (plaintiff school district realigned as a "friendly adversary").

42. *Jenkins*, 110 S. Ct. at 1657.

enough to draw nonminority students from outside the district.[43] The Eighth Circuit affirmed this order as a proper remedy and the Supreme Court denied certiorari.[44]

The problem with carrying out the court's order was funding, because creating "suburban comparability" would cost many millions of dollars. State law, including the state constitution, limited the amount of property taxes that could be imposed.[45] After the school district failed to persuade the voters to adopt a higher tax, the district court ordered a property tax levy.[46] The Eighth Circuit affirmed the order to increase property taxes to the extent that such taxes already had been imposed; however, it also held that in the future, the district court should not order the tax directly but instead should authorize the school district to submit a levy to the state tax collection authorities, and should enjoin the operation of state law limitations on the levy of property taxes.[47]

In the Supreme Court, the State argued that the district court's imposition of a property tax increase violated article III and the tenth amendment of the federal Constitution, and principles of federal and state comity.[48] Justice White, writing for the five-member majority, found it unnecessary to decide whether the district court's order of a property tax violated article III or the tenth amendment. The majority found (and the dissent agreed on this point) that the court-ordered taxation was an abuse of the district court's equitable discretion.[49]

As in *Spallone*, the *Jenkins* Court began with the proposition that the district court enjoys broad equitable powers to remedy discrimination, but that principles of federalism require that intrusive remedies not be used if they are "overkill."

There is no dispute that court-ordered taxation is an extraordinary remedy. Obviously such taxation intrudes to a great degree on local determinations and policy considerations. The Court in *Jenkins* stated that while local authorities are not to be given untrammelled discretion to remedy discrimination, they at least should have the opportunity to devise their own solutions to these problems, espe-

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43. *See* Jenkins v. Missouri, 639 F. Supp. 19, 54 (W.D. Mo. 1985).

44. Jenkins v. Missouri, 807 F.2d 657, 686 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

45. *See* MO. CONST. art. 10, § II (b)(c); MO. REV. STAT. §§ 163.087, 164.013 (1991).

46. *Jenkins*, 110 S. Ct. at 1688 (citing Jenkins v. Missouri, 672 F. Supp. 400, 412-13 (W.D. Mo. 1987)).

47. *See* Jenkins v. Missouri, 855 F.2d 1295, 1314 (8th Cir. 1988).

48. *See Jenkins*, 110 S. Ct. at 1659.

49. *See id.* at 1663, 1667.

cially where, unlike in *Spallone*, the local authorities show a willingness to comply.[50]

The Court differed with the district court as to whether direct taxation was necessary here as a last resort. According to the Court, the district court could have used the less intrusive alternative suggested by the court of appeals— requiring the school district to levy the taxes and enjoining the operation of state laws which would have prevented the school district from imposing them.[51]

While the district court abused its discretion in imposing the tax itself, the majority affirmed the Eighth Circuit's holding that the district court should have authorized the school district to levy its own taxes and enjoined state law restrictions.[52] As in *Spallone*, the Court has drawn a fine line between the impermissible direct remedy and the permissible indirect remedy. As applied to the facts in *Jenkins*, the end result is the same—local property taxes are increased in violation of state law.

Justice White argued that the distinction is more than a matter of form: directing the school district to implement a remedy "protects the function" of a local institution, and "places the responsibility for solutions" to the problems of segregation upon those who created the problems.[53] Despite Justice White's contention, the distinction is really one of form. The methods seem equally intrusive and have identical effects on the local taxpayer and on the viability of local law: no matter whether taxes are imposed directly or indirectly, property taxes are increased and local law is disregarded.

Nor is the "function" of a local institution especially protected when it is ordered to impose a tax, as opposed to situations in which it is not involved at all in a court-ordered taxation. Arguably, a court order requiring the institution to impose a tax (thus rendering it an errand boy for the federal court) is *more* destructive of its function than simply imposing a tax without participation of the institution. Assuming that indirect taxation is different in kind than direct taxation, the question remains whether an indirect scheme of taxation violates article III, the tenth amendment, or principles of equity and federalism.

Justice White rejected the argument that the modified remedy was a violation of principles of equity and federalism. Having denied certiorari on the same issue previously, the Court refused to

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50. *See id.* at 1663.
51. *See id.*
52. *See id.* at 1664.
53. *Id.* at 1663.

address the State's argument that the remedial order itself, which required the expenditure of millions of dollars to develop a magnet school district, intruded excessively on state authority.[54]

The Court rejected the argument that the district court should have ordered that funds to cover the shortfall come from the State, rather than from an increase in local taxes. Given that the State had strenuously objected to efforts to make it responsible, the district court could not be faulted for apportioning responsibility, and for not re-allocating local responsibility to the State. Accordingly, Justice White reasoned that enjoining state law limitations and ordering a local institution to levy a tax was within the district court's equitable discretion as a reasonable means to remedy discrimination without being inordinately intrusive.[55]

In addition to holding that the modified order comported with principles of federal and state comity, the majority found that the "indirect taxation" here did not violate the tenth amendment, which reserves nondelegated powers to the states. In essence, the fourteenth amendment, which authorized the funding procedure in *Jenkins*, represents an exception to the reserved powers of the tenth amendment because it is directed against the power of the states.[56]

Finally, the majority held that the district court's order directing a local body to levy its own taxes is within the judicial power of article III. However, very little analysis accompanied the Court's conclusion that such an order is "plainly a judicial act."[57] The Court relied on several prior cases to support this assertion, but their precedential value appears tenuous. For instance, *Griffin v. Prince Edward County School Board*,[58] one of the cases on which the Court relied heavily, did not concern a tax imposed in violation of state law, and in fact did not concern a tax at all. Another precedent cited by the Court was *Von Hoffman v. City of Quincy*,[59] in which the

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54. *See id.* at 1664.

55. *See id.* at 1664-65.

56. *See generally* Milliken v. Bradley, 433 U.S. 267 (1977) (the district court's remedy, intended to eliminate unconstitutional segregation, did not jeopardize the principles of federalism and merely enforced the guarantees of the fourteenth amendment).

57. *See Jenkins*, 110 S. Ct. at 1665.

58. 377 U.S. 218 (1963). This case held that the closing of public schools in Prince Edward County, while contributing to support of segregated white schools, violated the equal protections of the constitution. Additionally, the Court upheld the district court's order preventing county officials from paying tuition grants or giving tax credits to white children while the public schools remained closed.

59. 71 U.S. (4 Wall.) 535, 555 (1866) (an act passed by the city, which put a limit on the amount of taxes that could be collected to pay off bond obligations was a nullity as it related to bond contracts created before the act was passed; holding also that the lower

Court enjoined the operation of an unconstitutional state law limitation. *Von Hoffman* does not appear to control in *Jenkins*, where the state law limitations on property taxes were never alleged to be unconstitutional.

As noted by Justice Kennedy, joined in his dissent by Chief Justice Rehnquist and Justices O'Connor and Scalia, the majority's main concern is that if a federal court cannot order a state or local entity to levy a tax in violation of state law, then the court may be unable to remedy a constitutional violation. The dissenters responded to that concern by questioning whether the district court's sweeping remedy was necessary to remedy discrimination, and ultimately by assuming that the Constitution envisions situations where a federal court is unable to remedy every constitutional wrong.[60] The dissent rejected as formalistic the distinction between direct court-ordered taxation and ordering the school district to levy a tax in violation of state law limitations, observing that "absent a change in state law, the tax is imposed by federal authority under a federal decree."[61]

Justice Kennedy argued that taxation is not within the article III judicial power, but rather that it is part of the legislative and political process that is outside the competence of the courts. According to the dissent, courts are ill-suited to engage in the policy choices and empirical questions that are involved in taxation.[62]

The dissenters also argued that court-ordered taxation violates the due process rights of taxpayers in that it is taxation without representation. To some extent, this is an argument that could apply to all structural injunctions: major remedies such as prison reform, even if they do not require increased taxes, at least require a legislative-type allocation of governmental funds and a withdrawal of funds from other areas, which may harm certain citizens who were unrepresented at trial. Indeed, the majority and dissent in *Jenkins* espouse completely different views about the role of the district court in effectuating structural injunctions to solve social problems. The dissent views the court more traditionally as an institution that resolves ad hoc disputes through traditional remedies. The majority views the court more broadly as a forum for institutional reform. This major disagreement is obscured, however, by the limited grant

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courts erred in overruling the application for mandamus forcing the city to levy and collect taxes in contravention of the new act but obligatory under the bond contracts).

60. *See Jenkins*, 110 S. Ct. at 1675-76 (Kennedy, J., dissenting).

61. *Id.* at 1670.

62. *See id.* at 1670-76.

of certiorari in *Jenkins*, and is likely to arise more clearly if the court decides to confront the propriety of a structural injunction.[63]

Implications of Jenkins.—While indirect taxation in violation of state law has been upheld when necessary to fund a remedy for discrimination, the Supreme Court in *Jenkins* did not pass on the propriety of the underlying remedy ordered by the district court and approved by the Eighth Circuit.[64] The Court has approved the use of magnet schools to encourage voluntary movement of students *within* the district, while rejecting interdistrict remedies in the absence of interdistrict wrongdoing.[65] But the Court has not yet approved a vast upgrading of an entire school district so that the district as a whole is a magnet for students outside the district. Likewise, most lower courts allow the use of magnet programs, but only to encourage movement inside the district and even then only because other remedies have failed.[66]

The magnet district remedy is an outgrowth of change in demographics. Many urban school districts cannot be integrated within the district because there are not enough white students in public schools to go around. It is also a change in emphasis from the unitary school system model: while clothed in terms of integration, it is really a move toward comparability in education. Thus, whether or not white students are attracted to the magnet schools, black students are entitled to comparable education in the city. The district court's orders in *Jenkins* are replete with references to "suburban comparability." Indeed, a school district cannot be a magnet if it is only comparable; it must be better. So the district court's remedy in *Jenkins* is really designed to promulgate what might be referred to as "separate but *truly* equal" education. So far, the Supreme Court has not spoken meaningfully about the move from a unitary school system to one that might be labeled separate but truly equal. It is clear, however, that the dissenters in *Jenkins* do not look kindly on the magnet school district remedy; Justice Kennedy

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63. Commentators are divided about the propriety of the structural injunction as a means of institutional reform. *See, e.g.*, Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) ("The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality."); *cf.* Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (lauding judges who have taken a role in social reform).

64. *See Jenkins*, 110 S. Ct. at 1664.

65. *See* Milliken v. Bradley, 433 U.S. 267 (1977).

66. *See, e.g.*, Stell v. Savannah County Bd. of Educ., 888 F.2d 82, 85 (11th Cir. 1989) (upholding use of a magnet program where previous attempts to desegregate by mandatory pairing and busing had failed).

plainly states that such a remedy is disproportionate to the wrong.[67]

Although the Court in *Jenkins*, as in *Spallone*, held that the district court had abused its discretion in attempting to remedy discrimination, *Jenkins* is in fact inconsistent with *Spallone*. *Spallone* shows more concern for federalism principles, probably because of the legislative immunity concerns that the majority found pertinent in *Spallone*, but which did not exist in *Jenkins*. Apparently, ordering a local official to vote a certain way is considered more extraordinary than ordering a local entity to tax a certain way. Query what would happen in a case like *Jenkins* if the Court ordered the Board to levy a tax and the Board members refused. Could the Board members be held in contempt and fined? Arguably they could, because even *Spallone* implies that individual fines may be permissible as a last resort.[68] But if not, then *Jenkins* becomes limited to sweetheart litigation.

The swing vote in both cases was Justice White, who did not attempt to draw a distinction between the two cases. *Spallone* is not cited in Justice White's majority opinion in *Jenkins*, though it is cited by the dissent.[69]

Jenkins and *Spallone* do have one thing in common: they both draw excessively fine lines in determining whether the district court abused its discretion. In *Spallone*, the district court did not abuse its discretion in fining the city, but did so in fining the city council members. In *Jenkins*, the district court would not have abused its discretion in ordering the school district to tax and enjoin state law limitations, but did abuse its discretion in taxing directly.

Where the standard of review is abuse of discretion, and where the district court admittedly has broad equitable powers to remedy discrimination, such fine line distinctions are not appropriate—close calls are supposed to go to the district court. Thus, *Spallone* and *Jenkins* may indicate that the Court will engage in stricter scrutiny of district court orders which are designed to remedy discrimination—

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67. *See Jenkins*, 110 S. Ct. at 1678 (Kennedy, J., dissenting). For more on the changing strategies of school desegregation, see LOW & JEFFRIES, CIVIL RIGHTS ACTIONS, 1990 Supplement, at 200-03.

68. The majority agreed that only contempt sanctions against the city alone "failed to produce compliance within a reasonable time should the question of imposing contempt sanctions against petitioners [council members] even have been considered." Spallone v. United States, 110 S. Ct. 625, 634-35 (1990).

69. Justice Kennedy, in his dissenting opinion, cites to *Spallone*, in reference to the "perversion of the normal legislative process" and the intrusion of the federal courts on local government. *Jenkins*, 110 S. Ct. at 1673, 1677 (Kennedy, J., dissenting).

especially if they are as admittedly extraordinary as those used in *Spallone* and *Jenkins*.

After *Jenkins*, a school district that is unable to obtain increased funding from the voters may make an end-run around the political process. A finding of segregation can be used as a hook for extensive upgrading of a school district by court-ordered (indirect) taxation.[70] As the dissent notes, the analysis in *Jenkins* is not limited to school districts.[71] Apparently, court-ordered (indirect) taxation can be an appropriate means for any state or local institution to fund desegregation remedies.

One might ask why the Tax Injunction Act[72] did not figure in *Jenkins*. The court of appeals in *Jenkins* held that an order compelling the school district to levy a tax would not run afoul of the Tax Injunction Act because such an injunction would not inhibit the collection of taxes—far from it, it would increase the collection of taxes.[73] The Supreme Court expressed no opinion on this holding, but did note that another circuit was in accord.[74] The Eighth Circuit's view is a reasonable reading of the Tax Injunction Act, which by its terms applies only to federal court limitations on state taxation. Apparently then, local fiscal operations *can* be interfered with, so long as more money is placed in the treasury.

C. *Application of the Tax Injunction Act to Nontaxpayers:* Franchise Tax Board of California v. Alcan Aluminum Limited[75]

Alcan presented the issue of whether the Tax Injunction Act[76] bars a foreign corporation, the sole owner of a domestic subsidiary, from bringing an action in federal court under a foreign commerce clause[77] challenge. In this case two foreign corporations brought suit against the California Franchise Tax Board for declaratory and injunctive relief from the Board's method of determining the portion of taxable income of wholly-owned domestic subsidiaries allocable to California. The foreign corporations argued that the California system of unitary taxation violated the foreign commerce

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70. The Kansas City School District in *Jenkins* was initially a plaintiff, and was subsequently realigned as a defendant.

71. *Jenkins*, 110 S. Ct. at 1678-79 (Kennedy, J., dissenting).

72. 28 U.S.C. § 1341 (1982).

73. Jenkins v. Missouri, 855 F.2d 1295, 1315 (8th Cir. 1988).

74. *See* Appling County v. Municipal Elec. Auth., 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980).

75. 110 S. Ct. 661 (1990).

76. 28 U.S.C. § 1341 (1982).

77. U.S. CONST. art. I, § 8, cl. 3.

clause of the Constitution. The Seventh Circuit held that this suit was not barred by the Tax Injunction Act.[78] Writing for a unanimous Court, Justice White held that the Tax Injunction Act barred a federal action brought by a corporate parent to challenge the state taxation of its wholly owned domestic subsidiary.[79]

The Tax Injunction Act is grounded in principles of federalism, which are obviously implicated where a federal court enjoins state taxation. Congress considered it inappropriate for the federal government to interfere with local fiscal operations. However, by its terms the Act does not apply unless there is a "plain, speedy, and efficient remedy"[80] in the courts of that state. In *Alcan*, the domestic subsidiaries were the taxpayers, and under California law only the taxpayer could bring a challenge to the unitary tax and seek relief in California state court—the parents could not. The Court concluded that the prohibition against foreign corporations bringing state court challenges in their own names was not dispositive, where, as here, they fully controlled entities that could institute such actions.[81] Consequently, the parent corporations had a plain, speedy, and efficient remedy through the subsidiaries.

The Court noted that the corporate parent's state court remedy would not be sufficient (and hence a federal action would not be barred) unless the state allowed the subsidiary to bring all the claims that the parent could bring. For instance, if the state court would not allow the domestic subsidiary to bring a foreign commerce clause argument on behalf of the parent, then the Tax Injunction Act would not bar a federal action. Nevertheless, since the parent in this case made no showing that California courts would preclude any of the parent's contentions when advanced by the subsidiary, Justice White refused to hold the Tax Injunction Act inapplicable on the basis of "mere speculation."[82]

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78. *Alcan*, 110 S. Ct. at 663.

79. *See id.* at 667.

80. *Id.* at 666. For additional discussion of "plain, speedy, and efficient remedy," see Osceola v. Florida Dept. of Revenue, 893 F.2d 1231, 1233 (11th Cir. 1990) (Florida state courts afford speedy, efficient remedy, because Florida state circuit courts have jurisdiction to hear challenges to any state tax, power to issue declaratory and injunctive relief in tax cases, and Florida taxpayers have statutory right to seek tax refund of any tax paid under an unconstitutional law); McQueen v. Bullock, 907 F.2d 1544, 1547-48 (5th Cir. 1990) (Texas courts afford speedy, efficient remedy because they permit taxpayers to assert federal claims, do not demand exhaustion of administrative remedies, and hear claims that agency contravened constitutional imperatives).

81. *See Alcan*, 110 S. Ct. at 666.

82. *Id.* at 667.

Implications of Alcan.—The major implication to draw from *Alcan* is that the Tax Injunction Act now can apply against non-taxpayers, but only when the non-taxpayer is found to control the entity that pays the taxes. *Alcan* was an easy case, since the subsidiary was wholly owned. The *Alcan* principle should apply, however, whenever the non-taxpayer has de facto control over the taxpayer. There are many close cases, but issues of corporate control routinely are handled by the courts.[83] *Alcan* also shows that the Court is prepared to give a liberal reading to the Tax Injunction Act, applying it even to non-taxpayers, in order to preserve the principles of federalism that are furthered by the Act.

D. *Waiver of Eleventh Amendment Sovereign Immunity:* Port Authority Trans-Hudson Corp. v. Feeney[84]

The Port Authority is an agency that is the product of a bi-state compact between New York and New Jersey.[85] Claims were brought under the Federal Employers' Liability Act (FELA)[86] against the Port Authority in the federal district court. The Port Authority claimed that it was entitled to eleventh amendment immunity.

The Second Circuit found the eleventh amendment inapplicable on two alternative grounds:

1. While the eleventh amendment applies to state agencies,[87] it cannot apply to bi-state agencies where the parent states are insulated from the agency's liability.[88]

2. Even if the Port Authority was entitled to eleventh amendment immunity, it had been waived by two provisions of an act governing suits against the Port Authority, which provisions were passed by New York and New Jersey.[89]

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83. *See, e.g.*, Capra, *Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue*, 9 FORDHAM INT'L L.J. 401 (1986) (discussing issues of corporate control in the context of personal jurisdiction and venue).

84. 110 S. Ct. 1868 (1990).

85. *Id.* at 1870 (citing to Act of 1921, ch. 151, 1921 N.J. Laws 412 and Act of 1921, ch. 154, 1921 N.Y. Laws 492).

86. 45 U.S.C. §§ 51-60 (1982).

87. *See* Alabama v. Pugh, 438 U.S. 781, 782 (1978) (Alabama Board of Corrections is a state agency entitled to eleventh amendment immunity).

88. *See* Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 631 (2d Cir. 1989), *aff'd*, 110 S. Ct. 1868 (1990).

89. *See id.* at 632-33. The first section provides that the states "consent to suits, actions or proceedings of any form or nature at law, in equity, or otherwise . . . against the Port of New York Authority." N.J. STAT. ANN. § 32:1-157 (West 1963); N.Y. UNCONSOL. LAW § 7101 (McKinney 1979). A second section provides that consent to suit "is granted upon the condition that venue in any suit, action or proceeding against the Port

Justice O'Connor, writing for five Justices, held that the states had waived any eleventh amendment immunity that the Port Authority might have possessed.[90] She refused to decide whether an interstate agency ever can be entitled to eleventh amendment immunity.[91]

On the issue of waiver, the Court reaffirmed its "clear statement" rule of *Atascadero State Hospital v. Scanlon*,[92] that for a state to waive its sovereign immunity, it must clearly express an intention to be subject to suit in *federal* (as opposed to any other) court in the text of the statute. In *Feeney* the waiver provision was broad, consenting to all suits against the Port Authority.[93] Technically, this is not sufficient for a waiver under *Atascadero*, because it does not specifically refer to federal court.

Nonetheless, Justice O'Connor stated that an explicit waiver can be found through "other textual evidence" that may resolve the ambiguity in the broad consent to suit provision. In this case, the statutory venue provision conditioned consent to suit on location of venue "within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District."[94] Justice O'Connor concluded that the direct reference to the federal district court, in a provision conditioning consent to suit, resolved any ambiguity.[95]

Justice O'Connor explained that it is not the venue provision, by itself, which can provide a waiver of eleventh amendment immunity; rather, the venue provision informs interpretation of the consent to suit provision. Here, it would have been unnecessary to condition consent to suit on establishing venue in certain federal district courts if the consent provisions did not even apply to federal courts.

Authority shall be laid within a county or a judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District." N.J. STAT. ANN. § 32:1-162; N.Y. UNCONSOL. LAW § 7106.

90. *Feeney*, 110 S. Ct. at 1873.

91. *See id.* at 1872; *see also* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (bi-state agency whose parent states had disclaimed any immunity, and whose obligations were not binding on parent states, is not entitled to eleventh amendment protection).

92. 473 U.S. 234, 241 (1985) ("[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.") (emphasis in original).

93. *See supra* note 89.

94. *Feeney*, 110 S. Ct. at 1873; *see* N.J. STAT. ANN. § 32:1-162 (West 1963); N.Y. UNCONSOL. LAW § 7106 (McKinney 1979).

95. *Feeney*, 110 S. Ct. at 1874.

In an opinion joined by Justices Marshall, Blackmun, and Stevens, Justice Brennan concurred in part and concurred in the judgment. Justice Brennan agreed that the states had waived whatever immunity the Port Authority might have possessed, but argued that the Port Authority had not been entitled to eleventh amendment immunity in the first place.[96] Thus, Justice Brennan adhered to his position, first fully expressed in his dissent in *Atascadero*, that the eleventh amendment applies only to cases brought under the state-citizen diversity clause, and has no applicability to federal question cases.[97] In other words, the eleventh amendment means what it says, and is not some constitutionalized doctrine of common-law sovereign immunity.

The argument boils down to whether *Hans v. Louisiana*[98] should be overruled. *Hans* held that the eleventh amendment precluded suit against a state by its own citizens, even though that limitation is clearly not in the words of the eleventh amendment.[99] In the latest battle on this question, five members of the Court adhered to *Hans*,[100] even though a different five-member majority held that Congress had the authority under the commerce clause to abrogate eleventh amendment immunity— while a different five-person majority held that Congress had actually abrogated such immunity in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[101]

Justice Brennan also argued that even under the predominant view of the eleventh amendment, the Port Authority was not entitled to immunity because it is a bi-state agency and the treasuries of the parent states are insulated from Port Authority liability.[102] Under current law, the eleventh amendment applies to agencies that are "arms of the state."[103] Counties, for example, are not entitled to

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96. *See id.* at 1876 (Brennan, J., concurring).

97. *See Atascadero*, 473 U.S. at 258-98 (Brennan, J., dissenting). *See also* Welch v. Texas Dep't of Highways and Public Transp., 483 U.S. 468, 496-521 (1987) (Brennan, J., dissenting).

98. 134 U.S. 1 (1890).

99. The eleventh amendment of the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI.

100. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (permitting a suit for monetary damages against a state in federal court, and acknowledging Congress's authority to create such a cause of action when legislating pursuant to the commerce clause).

101. 42 U.S.C. §§ 9604, 9607 (1988).

102. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 110 S. Ct. 1868, 1876 (1990) (Brennan, J., concurring).

103. *See* Fincher v. Florida Dep't of Labor, 798 F.2d 1371 (11th Cir. 1986) (state un-

eleventh amendment immunity because they are autonomous bodies, not "arms of the state."[104]

Justice Brennan argued that if counties are not entitled to immunity, interstate agencies *a fortiori* cannot be entitled to immunity. Such an agency is even more autonomous than a county by virtue of the fact that it receives its authority from two states and hence cannot be controlled by either state individually. Certain autonomy is also granted to bi-state agencies by the compact clause[105] of the Constitution. Because it is a creature of a compact, the bi-state agency by definition cannot be the arm of any one state.

The eleventh amendment applies even where the state or a state agency is not a named defendant, if the state is a real party in interest.[106] Justice Brennan contended that this rule could not benefit the Port Authority, since the Port Authority is independently and solely liable for any judgments against it.[107]

Implications of Feeney.—*Feeney* represents a continuing dispute over the true meaning of the eleventh amendment.[108] The dissenting view has now been weakened considerably by Justice Brennan's departure from the Court. On the other hand, even the majority was at least somewhat flexible in finding a "clear" statement of consent to suit. Although they searched only within the statutory text, their willingness to find that a venue provision informed a consent

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employment commission funded by state and subject to state administrative control is an arm of the state despite having local offices).

104. *See* Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977). *See also* Stem v. Ahearn, 908 F.2d 1, 4 (5th Cir. 1990) (listing factors for deciding whether entity is organ of state or county government for eleventh amendment immunity purposes); Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1511 (11th Cir. 1990) (county school board is not arm of state). *Stewart* noted that there was a disagreement among the circuits as to whether a denial of eleventh amendment immunity is an immediately appealable collateral order. *Id.* at 1509. Leaving the issue unresolved, the *Stewart* court exercised its "discretion to assume pendent appellate jurisdiction over this issue," *id.*, in order to review the issue along with the denial of a claim of absolute immunity, which is clearly immediately appealable under the collateral order doctrine. *Id.* at 1507.

105. U.S. CONST. art. I, § 10.

106. *See* Edelman v. Jordan, 415 U.S. 651, 653 (1974) (state is real party in interest where judgment will be paid from the state treasury).

107. Port Auth. Trans-Hudson Corp. v. Feeney, 110 S. Ct. 1868, 1876 (1990) (Brennan, J., concurring).

108. For scholarly commentary on the two views of the eleventh amendment, see, *e.g.*, Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Massey, Marshall, Marshall & Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 117 (1990).

to suit provision reflected a softening of the strict *Atascadero* view.[109] The end result of this is that while the eleventh amendment still means more than it says, the broad view of sovereign immunity will be inapplicable as a practical matter in many cases.

II. SUBJECT MATTER JURISDICTION

In addition to *Feeney*, the Supreme Court decided five cases concerning subject matter jurisdiction in the 1989-90 term. Three cases dealt with federal subject matter jurisdiction. All three of these cases concerned relatively arcane matters, but two of the decisions included surprisingly lively interchanges between the Justices. Two cases applied consistent analysis to whether certain congressionally-created causes of action were within the exclusive jurisdiction of the federal courts. In this area, the Court gravitated toward principles of tradition, deference to the legislature, and simplification to decide the cases.

A. Diversity and Limited Partnerships: Carden v. Arkoma Associates[110]

A limited partnership brought a diversity suit in federal district court against citizens of Louisiana and won a money judgment. Defendants argued that there was no complete diversity because one of the partnership's limited partners was a citizen of Louisiana.

Justice Scalia, writing for five members of the Court, held that a limited partnership was not a "citizen" for purposes of the diversity statute. The majority concluded that a federal court must look to the citizenship of all partners—general and limited—for diversity purposes.[111]

The Court relied heavily, indeed exclusively, on traditional jurisprudence under the diversity statute concerning the treatment of

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109. Despite its professed adherence to the *Atascadero* clear-statement rule, the Court in *Union Gas* engaged in a relatively liberal construction of CERCLA to determine whether Congress had abrogated eleventh amendment immunity. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989). Thus, *Feeney* and *Union Gas* may be indicative of a trend away from the extremely strict standards of statutory construction established in *Atascadero*. On the other hand, in two recent cases the Court took a very strict view of whether Congress intended to override eleventh amendment immunity. *See* Dellmuth v. Muth, 491 U.S. 223 (1989) (no clear statement in Education of the Handicapped Act that abrogates state immunity); Hoffman v. Connecticut Dep't of Bankruptcy, 492 U.S. 96 (1989) (no clear statement in Bankruptcy Act that abrogates state immunity). So perhaps the best that can be said is that the Supreme Court has been inconsistent in its application of the "clear statement" rule.

110. 110 S. Ct. 1015 (1990).

111. *See id.* at 1021.

entities.[112] The majority noted that its opinion legitimately could be criticized as technical, tradition-bound, and out of step with state developments concerning business entities. But Justice Scalia emphasized that adherence to traditional rules of procedure has its own value (especially at the threshold stage of litigation) and that any change in such procedures must come from Congress, which is in a better position than the Court to determine policy choices concerning diversity jurisdiction.

In her dissent, Justice O'Connor, joined by Justices Brennan, Marshall, and Blackmun, argued that the issue was whether a limited partner should be counted for diversity purposes.[113] She contended that limited partners should not count since they were not real parties to the controversy, in that they had no control over the subject matter of the litigation.

Justice Scalia asked a different question—whether the artificial entity before the court was a citizen for diversity purposes. This could not be answered, according to the majority, by the real party in controversy test.

Justice O'Connor pointed out that the majority's decision in *Carden* would not necessarily prevent suits by or against limited partnerships in diversity. She noted that the partnership could gain access to federal court by bringing or defending an action as a class under rule 23 of the Federal Rules of Civil Procedure.[114] While this may work efficiently for the limited partnership as a class of defendants, it will not be so easy for the limited partnership to bring a class action as plaintiff. It is true that in a class action in diversity, only the citizenship of the named class representatives are counted.[115] However, for amount in controversy purposes, each member of the class must independently satisfy the jurisdictional amount.[116] Since the requisite jurisdictional amount is now $50,000, cases in which each limited partner will satisfy that amount will be relatively rare.

Implications of Carden.—In *Carden*, as in other areas of the law, Justice Scalia has begun to move the Court toward a philosophy of

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112. *See id.* at 1016-22. *See, e.g.*, Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 153 (1965) (labor union is not a citizen for diversity purposes, thus all members of the union must be counted).

113. 110 S. Ct. at 1026 (O'Connor, J., dissenting).

114. *Id. See* Note, *Federal Diversity Jurisdiction—Citizenship for Unincorporated Associations*, 19 VAND. L. REV. 984, 992 (1966) ("[i]n class actions, diversity need be satisfied only as to the representatives of the class").

115. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 356-66 (1921).

116. *See* Zahn v. International Paper Co., 414 U.S. 291, 294-95 (1973).

strict adherence to tradition, advocating the limits on judicial activism that an adherence to tradition implies.[117] It will be the rare case where a traditional rule of procedure will be rejected, even if it is admittedly outmoded. *Carden* also demonstrates the Court's interest in deferring to Congress in jurisdictional matters.

B. *Diversity and Direct Actions by Insurers:* Northbrook National Insurance Co. v. Brewer[118]

Pursuant to a unique rule of Texas worker's compensation law, which allows insurers to bring a civil suit to set aside an award, an Illinois insurer brought an action in federal district court against a Texas employee. The employee argued that the Texas citizenship of the employer should be attributed to the insurer under the direct action proviso of the diversity statute,[119] thus destroying diversity.

Justice Marshall, writing for an eight member majority, held that the direct action proviso, mandating that the citizenship of the insured be attributed to the insurer in direct action cases, did not apply to insurers who were plaintiffs.[120] Thus the employer's citizenship could not be attributed to the insurer under the peculiar circumstances of this case.

The majority invoked the plain meaning rule of statutory construction.[121] Section 1332(c) states specifically that in any direct action *against* an insurer, the insurer will be deemed to be a citizen of the State of which the insured is a citizen. Thus, by its terms, the direct action proviso does not apply to actions brought *by* insurers.

The majority noted that the plain meaning of the statute created an anomaly: the nonresident insurer who is sued by a local

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117. *See* Burnham v. Superior Court, 110 S. Ct. 2105 (1990); *infra* notes 197-224 and accompanying text; Michael H. v. Gerald D., 109 S. Ct. 2333, 2341 (1989) (due process interests must be determined by what has been traditionally accepted in society); California v. Acevedo, 111 S. Ct. 1982 (1991) (concurring opinion) (protections of fourteenth amendment are those afforded by the common law).

118. 110 S. Ct. 297 (1989).

119. 28 U.S.C. § 1332(c) (1988).

120. *Northbrook*, 110 S. Ct. at 297.

121. *See generally* United States v. Monsanto, 109 S. Ct. 2657 (1989). On the limits of the plain meaning rule, see Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989):

> [J]udges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute "plain" is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures . . . often legislate in haste, without considering fully the potential application of their words to novel settings.

resident will be unable to remove from state court (and thus will suffer local prejudice) whereas the nonresident insurer who brings an action against a local defendant can avoid local prejudice by bringing the case originally in federal court. This anomaly, however, was not so illogical or absurd as to overcome the plain meaning rule.[122]

Justice Stevens, dissenting, argued that the action brought by the insurer in this case was in fact against itself, since the insurer in effect was appealing an award on which the employee retained the burden of proof.[123] He also noted that in doubtful cases, the Court should opt for a construction that would limit, rather than expand diversity jurisdiction.[124]

Finally, Justice Stevens argued that the Court should not have wasted its limited resources on a case with so little practical or precedential value.[125] The likelihood of direct action insurers bringing a suit is very remote and in fact seems limited to the unique Texas worker's compensation scheme.

Implications of Northbrook.—As noted above, the practical implications of *Northbrook* are minimal. Nevertheless, the case is noteworthy for one jurisprudential point: the analysis is indicative of the trend in the Court to adhere strictly to the text of a statute, even if the results appear anomalous.[126] Adherence to plain meaning, like adherence to tradition, is designed to control mischievous judicial activism.

C. *Admiralty Jurisdiction Where a Tort Bears Significant Relationship to Traditional Maritime Activity:* Sisson v. Ruby[127]

A fire erupted on Sisson's recreational boat while it was docked at a marina on a navigable waterway, destroying Sisson's boat and damaging several other boats and the marina. Sisson filed an action for declaratory and injunctive relief under the Limited Liability

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122. *Northbrook*, 110 S. Ct. at 300-01. On the application of the "absurd result" exception to the plain meaning rule, see, *e.g.*, Holy Trinity Church v. United States, 143 U.S. 457 (1892).

123. *Northbrook*, 110 S. Ct. at 302-03 (Stevens, J., dissenting).

124. *Id.* at 304. Justice Stevens joined Justice Scalia's diversity-limiting opinion in Carden v. Arkoma Assocs., 110 S. Ct. 1015 (1990). *See also* Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1978) (noting the need to restrict diversity jurisdiction where possible).

125. *Northbrook*, 110 S. Ct. at 304 (Stevens, J., dissenting).

126. *See, e.g.*, United States v. Monsanto, 109 S. Ct. 2657 (1989) (plain language of forfeiture statute applies to attorney's fees).

127. 110 S. Ct. 2892 (1990).

Act[128] to limit his liability to the salvage value of his vessel.

The lower courts held that there was no maritime jurisdiction under 28 U.S.C. section 1333(1),[129] reading the Supreme Court's decision in *Foremost Insurance Co. v. Richardson*[130] to hold that noncommercial vessels must be in navigation to permit the exercise of admiralty jurisdiction.[131]

Although the Supreme Court unanimously rejected the contention that a noncommercial vessel must be in navigation to invoke maritime tort jurisdiction, it split 7-2 as to the proper test to be applied. Justice Marshall, writing for seven members of the Court, held that maritime jurisdiction existed in this case because: (1) there was potentially disruptive impact on maritime commerce; and (2) there was a substantial relationship between the activity giving rise to the injury and traditional maritime activity.[132]

The Court reaffirmed that the traditional locality test (looking solely to the fact that the tort occurred on navigable waters) was an insufficient basis for establishing maritime jurisdiction. While the locality test must be satisfied, it is not, by itself, enough to trigger the policies behind admiralty jurisdiction of assuring uniform rules of conduct for commercial vessels on navigable waters. *Executive Jet Aviation, Inc. v. City of Cleveland*[133] requires that beyond occurring on navigable waters, the wrong also must bear a significant relationship to traditional maritime activity in order to invoke maritime jurisdiction.[134]

The Court noted that subsequent to *Executive Jet Aviation*, it extended the "relationship to maritime activity" test of jurisdiction to all determinations of admiralty tort jurisdiction, not just to aviation torts.[135] Thus, the current test for admiralty jurisdiction requires that the injury occur in navigable waters and have a nexus to mari-

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128. 46 U.S.C. § 183(a) (1988).

129. Section 1333(1) grants federal district courts jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction . . . ." 28 U.S.C. § 1333(1) (1988).

130. 457 U.S. 668 (1982).

131. *See In re* Sisson, 663 F. Supp. 858 (N.D. Ill. 1987), *aff'd*, 867 F.2d 341 (7th Cir. 1989).

132. *Sisson*, 110 S. Ct. at 2896-98.

133. 409 U.S. 249 (1972) (where airplane was disabled over land and crashed into the water, jurisdiction was lacking because aviation torts did not bear a significant relationship to traditional maritime activity).

134. *See id.* at 268.

135. *See Sisson*, 110 S. Ct. at 2895 (citing Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (collision of two pleasure boats in navigable waters, where injury creates potentially disruptive impact on maritime commerce and activity, bears some substantial relationship to traditional maritime activity)).

time activity.[136] In *Sisson*, Justice Marshall derived from his earlier opinion in *Foremost* a two-pronged test to determine cases in which there exists a sufficient nexus to maritime commerce to trigger admiralty jurisdiction.

First, the injury must have a potentially disruptive impact on maritime commerce.[137] This prong was met in both *Executive Jet* and *Foremost*, since crashes in navigable waterways can disrupt maritime commerce, even where noncommercial or even nonmaritime vessels (such as the plane in *Executive Jet*) are involved. In *Sisson*, the injury was a fire at a marina on a navigable waterway. The Court found that such a fire had potentially disruptive impact on maritime commerce, thus satisfying the first prong of the *Foremost* test. The Court noted that all that was needed was *potential* impact on maritime commerce: thus it was not relevant that the fire began on a noncommercial vessel, or even that no commercial vessel actually was damaged by the fire. The jurisdictional inquiry does not depend on what actually happened, but what could have happened in this *type* of incident; thus, the Court rejects a fact-specific jurisdictional inquiry.

To satisfy the second prong of the sufficient nexus test, the party seeking to invoke maritime jurisdiction must show that the activity giving rise to the incident is substantially related to traditional commercial maritime activity.[138] This explains why jurisdiction was found lacking in *Executive Jet*—aviation is nothing like traditional maritime activity of commercial vessels.

In contrast, the activity in *Foremost*—navigation—is substantially related to traditional maritime activity. The Seventh Circuit read *Foremost* as providing jurisdiction only for navigation-related torts, but the Supreme Court rejected that reading as too limited. Justice Marshall reasoned that the interest giving rise to admiralty jurisdiction is the protection of maritime commerce through the establishment of uniform rules of conduct, and the need for uniform rules of conduct is not limited to navigation, but applies to any activity traditionally undertaken by commercial vessels—though the vessel at issue in the particular case need not be commercial, so long as it is engaged in activity traditionally undertaken by commercial vessels.[139]

The Court noted that like the first prong, the second prong of

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136. *See generally* Harville v. Johns-Manville Prods. Corp., 731 F.2d 775 (11th Cir. 1984).

137. *See Sisson*, 110 S. Ct. at 2896.

138. *See id.* at 2897.

139. *See id.* at 2898.

Foremost is not fact-specific. It does not focus on the cause of the harm (for example, a fire started by a washer/dryer as in *Sisson*, which does not appear to be inherently maritime-related), but rather on the general activity that the vessel was engaged in at the time of injury.[140]

Thus, the relevant activity for purposes of the second prong in *Sisson* is the storage and maintenance of vessels at a marina on navigable waters.[141] The Court found such storage and maintenance to be substantially related to traditional maritime activity, "given the broad perspective demanded by the second aspect of the [*Foremost*] test," as commercial vessels, similarly, are traditionally docked, stored, and maintained.[142]

Justice Scalia, joined by Justice White, concurred in the judgment. Justice Scalia argued that the majority's complex two-pronged test, which will lead to a finding of maritime jurisdiction for most vessel-related torts anyway, imposes unnecessary costs and confusion. He advocated a simpler rule— that a tort occurring on a vessel in navigable waters should always be within the admiralty jurisdiction. While this might leave some unusual actions within the admiralty tort jurisdiction (such as a libel on a ship), such cases would be sufficiently rare that the costs of hearing them would be outweighed by the savings of applying a clear jurisdictional test.[143] Justice Scalia noted the value of having clear rules on jurisdictional issues[144]—it makes little sense to have drawn-out arguments and unpredictable rules for preliminary questions such as where a suit can be brought.

Implications of Sisson.—*Sisson* is one case where the majority rejected the invitation to simplify the law of jurisdiction. However, the issue cannot be considered closed. The vagueness of the test in *Sisson* is sure to breed dissatisfaction and confusion in the lower courts, giving rise to the inevitable desire to simplify—especially on a preliminary issue such as subject matter jurisdiction.

Sisson clearly shows an intent to expand the admiralty tort jurisdiction. Justice Scalia is probably correct that something close to the old locality test will result, at least whenever a vessel is involved.

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140. *See id.* at 2897.
141. *Id.*
142. *Id.* at 2898.
143. *Id.* at 2899-902 (Scalia, J., concurring).
144. See also Justice Scalia's opinions in Carden v. Arkoma Assocs., 110 S. Ct. 1015 (1990), and Burnham v. Superior Court, 110 S. Ct. 2105 (1990), both of which apply clear rules to jurisdictional issues.

Almost anything occurring on a vessel in navigable waters can have a potentially disruptive impact on maritime commerce and can be substantially related to traditional maritime activity—especially at the abstract level mandated by the Court in *Sisson*.

The Court in *Sisson* left open many questions:

1. Nexus Requirement.—Before *Sisson*, many circuits determined the nexus requirement for admiralty tort jurisdiction by use of a four-part test established in *Kelly v. Smith*,[145] which considered: (i) the functions and roles of the parties; (ii) the types of vehicles and instrumentalities involved; (iii) the causation and type of injury; and (iv) traditional concepts of the role of admiralty law.[146]

In *Sisson*, Justice Marshall refused to resolve whether the *Kelly* test was appropriate for determining whether an activity is substantially related to traditional maritime activity. He stated that the general test provided in *Foremost* gave sufficient guidance.[147]

Yet it is fair to conclude that at least some aspects of the *Kelly* test, as applied by the lower courts, are suspect after *Sisson*. For example, in *Lewis Charters, Inc. v. Huckins Yacht Corp.*,[148] a fire began at a paint facility of a marina, destroying two yachts and the paint facility. The court found an insufficient nexus to traditional maritime activity. However, after *Sisson*, the result in *Lewis Charters* should be different— admiralty jurisdiction should exist since the activity was substantially related to traditional maritime activity under the broad, conceptual *Sisson* test.

Looking at the first prong of the *Kelly* test, the court in *Lewis Charters* found it weighing against admiralty jurisdiction, as there were no personal injuries to anybody engaged in a maritime role.[149] Certainly after *Sisson*, this fact-specific application is suspect. Moreover, the functions and roles of the parties are not as relevant as what the *vessel* was doing. Looking at the second prong, the court stated that the boats were not actually engaged in navigation at the time of the tort.[150] Clearly this is irrelevant after *Sisson*—if the vessel is engaged in activity traditionally undertaken by commercial vessels, it need not actually be engaged in navigation.[151] Looking at the third prong of *Kelly*, the court in *Lewis Charters* considered the

145. 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).
146. *See id.* at 525.
147. *See Sisson*, 110 S. Ct. at 2897-98 n.4
148. 871 F.2d 1046 (11th Cir. 1989).
149. *See id.* at 1051.
150. *Id.*
151. *See supra* note 139 and accompanying text.

cause of the injury, and emphasized that other vessels in navigation were unlikely to be harmed in the specific case.[152] This analysis is too fact-specific after *Sisson*. Finally, with regard to the broad, final factor, the court in *Lewis Charters* emphasized that the damaged vessels were a distance away from other vessels.[153] Again, this appears too fact-specific after *Sisson*.

Thus, to the extent the *Kelly* four-pronged test requires a fact-specific analysis, it is substantially weakened by the general, abstract analysis mandated by *Sisson*. Even if the *Kelly* test can be applied in a more generalized manner (and this is doubtful in light of its specific emphasis on causation) there would seem to be little purpose in doing so because the *Sisson* Court does not appear interested in putting much structure into its broad nexus test.

2. Limitation of Liability Act.—The Court in *Sisson* did not decide whether the Limitation of Liability Act[154] contains its own grant of admiralty jurisdiction that would not require an application of the nexus test. The Seventh Circuit rejected this claim, as has the Eleventh Circuit.[155] It would be anomalous to extend the outmoded concepts of the Limitation Act— allowing the vessel owner liability limited to the amount of an often —— vessel, without regard to the extent of injuries caused—to situations where the maritime nexus test is not even met. This is especially so with respect to noncommercial vessels, given the intent of the Limitation Act to restore a commercial maritime enterprise to money-making and job-creating activity.[156] Whether the Limitation Act contains its own grant of jurisdiction may not be very important as a practical matter, however, given the expansive breadth of maritime tort jurisdiction (28 U.S.C. section 1333(1)) after *Sisson*.

3. Admiralty Extension Act.—The *Sisson* Court did not decide whether the Admiralty Extension Act[157] provided an independent basis for jurisdiction. This Act removed an inconsistency in the locality rule to allow an action for damage caused by a vessel on navigable water, even if the injury was consummated on land. In *Sohyde*

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152. *Lewis Charters*, 871 F.2d at 1051.

153. *Id.*

154. 46 U.S.C. §§ 181-196 (1988).

155. *Lewis Charters*, 871 F.2d at 1054.

156. *See* Sweeney, *Admiralty Tort Jurisdiction Extends to Pleasure Craft Not in Navigation*, 7 Lloyd's Maritime Law Reports, no. 13 (1990).

157. 46 U.S.C. § 740 (1988).

Drilling & Marine Co. v. Coastal States Gas Producing Co.,[158] the former Fifth Circuit held that the principles of *Executive Jet* applied to the Admiralty Extension Act. According to the *Sohyde* court, where the injury is not related to traditional maritime activity, the Admiralty Extension Act does not allow an end-run around the limitations of 28 U.S.C. section 1333.[159] This holding is persuasive, since there is no congressional indication in the Extension Act that admiralty jurisdiction should be expanded beyond the locality test to all torts concerning a vessel. A fair reading of the statute suggests that it applies only to those torts traditionally related to maritime activity.

4. Nonmaritime Activities.—The Court in *Sisson* did not decide how its two-pronged test would be applied if some of the instrumentalities were not engaged in traditional maritime activity (for example, a boiler on a vessel exploded, and flying parts hit an airplane which crashed into navigable water).[160] The Court intimated, however, that the more sophisticated *Kelly* test may be appropriate to apply in these circumstances.[161]

D. Concurrent Jurisdiction in Civil RICO Cases: Tafflin v. Levitt[162]

Burford[163] abstention was invoked by the lower courts as to civil RICO claims.[164] But abstention is obviously inappropriate if there is exclusive federal jurisdiction over RICO claims. The Supreme Court granted certiorari to resolve a conflict in the courts about whether state courts have been divested of jurisdiction to hear civil RICO cases.[165]

Justice O'Connor, writing for a unanimous court, held that state courts have concurrent jurisdiction over civil RICO claims.[166] The linchpin of the Court's analysis is that the federal system is one of

158. 644 F.2d 1132 (5th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

159. *See id.* at 1136.

160. *See* Sisson v. Ruby, 110 S. Ct. 2892, 2897 n.3 (1990).

161. *See id.* at 2897 n.4.

162. 110 S. Ct. 792 (1990).

163. Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention is appropriate when important state regulatory issues are affected and state courts are part of the regulatory process). For a recent case involving *Burford* abstention, see Martin Ins. Agency, Inc. v. Prudential Reinsurance Co., 910 F.2d 249, 255 (5th Cir. 1990) (*Burford* abstention invoked in suit by insurance agency against reinsurers of insolvent casualty company in deference to Missouri's "comprehensive scheme for the regulation of insurance companies and their liquidation"). *See also* Vairo, *Making* Younger *Civil: The Consequence of Federal Court Deference to State Court Proceedings*, 58 FORDHAM L. REV. 173, 180-82 (1989).

164. 18 U.S.C. §§ 1961-1968 (1989).

165. *See Tafflin*, 110 S. Ct. at 794.

166. *See id.* at 794-95.

dual sovereignty. There is a heavy presumption of dual sovereignty, and a confidence in the general ability of state courts to hear all claims.[167] This presumption can be overcome by Congress, but that would require unmistakable congressional intent to do so.[168]

To determine whether Congress provided for exclusive jurisdiction over civil RICO claims, the Court applied the "accepted" three-prong test of *Charles Dowd Box Co. v. Courtney*.[169] Under *Dowd Box*, the presumption of concurrent jurisdiction can only be overcome if at least one of the following three factors is met: (1) an explicit statutory directive; (2) an unmistakable implication from legislative history; or (3) a demonstration that concurrent jurisdiction would be incompatible with federal interests.[170]

Applying this test to civil RICO actions, the Court found no explicit statutory directive of exclusive jurisdiction. Title 18 U.S.C. section 1964(c), the statute granting jurisdiction, says civil RICO actions *may* be brought in the federal courts.[171] On the second prong of *Dowd Box*, the Court found no unmistakable implication of exclusive jurisdiction from the legislative history. Justice O'Connor stated that there was no indication that Congress ever thought about the problem of concurrent jurisdiction. And speculation on what they would have thought if they had thought about it is insufficient to give rise to an unmistakable implication of congressional intent.[172]

The fact that civil RICO was modeled after the Clayton Act, which has been construed to provide for exclusive jurisdiction,[173] was held not dispositive. Justice O'Connor reasoned that congressional borrowing of language from an act does not mean that Congress meant to borrow all the baggage of Court construction of that act.[174] Omniscience of Congress as to all implications of the Clayton Act when passing civil RICO is not presumed by the Court. In sum, legislative silence leaves the second *Dowd Box* prong unsatisfied, given the strong presumption behind concurrent

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167. *See id.* at 795.

168. *See id. Cf.* Atascadero Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) (sovereign immunity can only be overcome by clear statement in the text of the statute).

169. 368 U.S. 502 (1962).

170. *See id.* at 522.

171. 18 U.S.C. § 1964(c) provides in pertinent part: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court . . . ." 18 U.S.C. § 1964(c) (1988).

172. *See* Tafflin v. Levitt, 110 S. Ct. 792, 796-97 (1990).

173. *See* General Inv. Co. v. Lake Shore & M.S. Ry. Co., 260 U.S. 261, 286 (1922).

174. *See Tafflin*, 110 S. Ct. at 797.

jurisdiction.[175]

Finally, the Court found no indication that state court jurisdiction would be clearly incompatible with federal interests. Justice O'Connor admitted that with concurrent jurisdiction there arguably could be inconsistent construction of federal criminal law given the RICO predicate act requirement.[176] Petitioners in *Tafflin* argued essentially that there would be a reverse *Swift v. Tyson*[177] effect in civil RICO litigation if concurrent jurisdiction were granted.

But the Court found that the danger of inconsistency was not strong enough to overcome the heavy presumption in favor of concurrent jurisdiction. Justice O'Connor noted that inconsistency is endemic to a multi-membered judiciary.[178] She also contended that state courts will be guided by federal court precedents, and noted that there is ultimate review in the Supreme Court of state court misconstruction of civil RICO, and that in any event, federal courts will not be bound by state constructions.[179]

Essentially, the Court presumes that state courts are competent to decide these issues. Given the ruling in *Shearson/American Express, Inc. v. McMahon*[180] that civil RICO claims are arbitratable, a finding that state courts could not decide these federal questions, whereas arbitrators could, would be anomalous.

Justice Scalia, joined by Justice Kennedy, concurred, expressing his frequently stated view that the Court gives the legislative history of a statute more weight than it deserves.[181] While Justice Scalia agreed that the Court properly applied *Dowd Box*, he questioned whether the second and third factors of *Dowd Box* were appropriate means of determining whether concurrent jurisdiction had been abrogated. He noted that those two factors were dicta in *Dowd Box*.[182]

Justice Scalia argued that it is inconceivable that the heavy presumption of concurrent jurisdiction could be overcome by contrary indications in the legislative history. According to Justice Scalia, the

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175. *Id.* at 797.

176. *See id.* at 798.

177. 41 U.S. (16 Pet.) 1, 18 (1842) (the Constitution does not require the federal courts to apply state decisional law, but only state statutory law, thus freeing federal courts to apply federal common law where there is no state statute).

178. *See Tafflin*, 110 S. Ct. at 798.

179. *See id.*

180. 482 U.S. 220 (1987).

181. *Tafflin*, 110 S. Ct. at 802; *see, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (The task of the Court is to "interpret laws rather than reconstruct legislators' intentions. When the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

182. *Tafflin*, 110 S. Ct. at 800-01 (Scalia, J., concurring).

presumption can be overcome only by legislative *action*, not by legislative discussion.[183]

Nor, according to Justice Scalia, can incompatibility with federal interests by itself be enough to overcome the presumption. It is for Congress, not the courts, to determine when systemic federal interests make concurrent jurisdiction undesirable.[184] Justice Scalia implies that there should be an *Atascadero*-like clear statement before the presumption of concurrent jurisdiction is overcome.

Implications of Tafflin.—*Tafflin* is an aggressive statement of the presumption of concurrent jurisdiction, requiring a clear statement of exclusive jurisdiction in the statute to rebut it. It is clear that previous cases which found exclusive jurisdiction by implication (for example, in the Clayton Act) would be decided differently today.[185] The strong statement of concurrent jurisdiction is simply an outgrowth of the federalism principles that control much of the Court's jurisprudence in the area of federal civil practice.

In *Tafflin*, the Court takes another step toward rejection of legislative history as an aid in statutory construction. It is notable that Justice O'Connor's opinion in *Tafflin* does not reject Justice Scalia's textualist view. She applies the three-pronged test of *Dowd Box* since there is no dispute among the parties as to its applicability. Thus, this case does not impede the Court's move to a general textualist view of statutory interpretation. As a practical matter, after *Tafflin* there will be some relief in the federal courts from civil RICO litigation, since as in *Tafflin*, the district court can exercise *Burford* abstention in appropriate cases.

E. *Concurrent Jurisdiction over Title VII Claims:* Yellow Freight System v. Donnelly[186]

An employee received a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), which advised her to bring the suit in ninety days. Within the ninety day period, the employee brought a state law action for sex discrimination in state court. After the ninety day period expired, she amended her complaint in state court to include a title VII claim. Upon removal to federal court, the district court found that the amended claim re-

183. *Id.* at 802.

184. *Id.*

185. *See* General Inv. Co. v. Lake Shore & M.S. Ry. Co., 260 U.S. 261 (1922) (section 4 of Clayton Act confers exclusive jurisdiction on federal courts).

186. 110 S. Ct. 1566 (1990).

lated back to the date of filing of the original state law claim, pursuant to rule 15(c) of the Federal Rules of Civil Procedure. The propriety of relation back was not discussed by the Supreme Court.

The question in the Supreme Court was whether (presuming the title VII claim related back to it) the filing in state court served to toll the ninety day period. Tolling would not occur if state courts did not have concurrent jurisdiction over title VII claims.[187]

Justice Stevens, writing for a unanimous Court, held that state courts have concurrent jurisdiction over title VII claims.[188] The Court used essentially the same analysis it had employed in *Tafflin*. The Court stressed the heavy presumption in favor of concurrent jurisdiction (it "lies at the core of our federal system"), looked for clear language of exclusive jurisdiction in the statute, and noted in passing the legislative history and the alleged incompatibility of concurrent jurisdiction with congressional goals.[189] The Court found no unmistakable language of exclusive jurisdiction. The statute merely says that the federal district court "shall have jurisdiction."[190] There is no language in title VII expressly *confining* jurisdiction to federal courts.

The legislative history does indicate that legislators had an expectation that federal jurisdiction over title VII claims would be exclusive.[191] But the Court held that such an expectation by some members of Congress was insufficient to overcome the strong presumption of concurrent jurisdiction. There must be a legislative decision, not just an expectation.[192] No incompatibility with federal interests was found. That certain procedures are specified in title VII that refer solely to federal court (for example, the Federal Rules)[193] does not render the use of comparable state procedures incompatible.

Query, though, why reference in the text of the statute to such clearly federal procedures does not "inform" the prior broad language concerning federal court jurisdiction, in the way that the reference to federal venue did in *Feeney*. It appears that the Court is

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187. *Id.* at 1568.

188. *See id.* at 1570.

189. *See id.* at 1568-69.

190. 42 U.S.C. § 2000e-5(f)(3) (1982).

191. *See Yellow Freight*, 110 S. Ct. at 1569 n.4; *see also* H.R. Rep. No. 914, 88th Cong., 1st Sess. 29 (1963) (Rep. McCulloch); 110 CONG. REC. 7213 (1964) (interpretive memorandum of Senators Clark and Case).

192. *See Yellow Freight*, 110 S. Ct. at 1569.

193. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(2) (1982) (providing for injunctive relief pursuant to FED. R. CIV. P. 65).

construing the exclusive jurisdiction doctrine even more strictly than the eleventh amendment doctrine.

Implications of Yellow Freight.—*Yellow Freight* together with *Tafflin* shows again that the Court is not relying on legislative history in any important way. In fact, *Yellow Freight* is even more dismissive of legislative history than is *Tafflin*, since in *Tafflin* Congress had not thought about the problem, whereas in *Yellow Freight*, the history is replete with an expectation of exclusive jurisdiction.

Yellow Freight overrules lower court precedent that had held that federal court jurisdiction over title VII claims was exclusive.[194] After *Yellow Freight*, a plaintiff's title VII claims in federal court can be dismissed on res judicata grounds, under the transactional test, if the plaintiff previously had brought a state law action in state court alleging employment discrimination (for example, wrongful discharge under state law). This is because the plaintiff could have brought the title VII claim together with the state claim in state court.[195] Res judicata would not be applicable, even as to claims arising from the same transaction, if the original court had no jurisdiction to hear one of the claims.[196]

III. PERSONAL JURISDICTION

The Supreme Court issued one opinion on personal jurisdiction in the 1989-90 term, and while it dealt with a relatively limited fact situation, the lengthy and vitriolic opinions in the case show the broader views of the Justices toward personal jurisdiction in particular and due process in general. On balance, the case shows the interest of most of the Justices to simplify the rules and to adhere to tradition where possible.

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194. *See, e.g.*, Long v. Florida, 805 F.2d 1542, 1546 (11th Cir. 1986), *rev'd on other grounds*, 487 U.S. 223 (1988).

195. *See, e.g.*, Reithmiller v. Blue Cross & Blue Shield, 824 F.2d 510, 511-12 (6th Cir. 1987) (failure to bring ERISA claim in state court, which had concurrent jurisdiction, results in preclusion under transactional test of res judicata where plaintiff brought earlier state claim for damages for lost pension benefits).

196. *See* Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 382 (1985) (a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts); RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (claim preclusion does not apply where "the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy . . . because of the limitations on the subject matter jurisdiction of the courts . . . .").

A. Transient Jurisdiction Satisfies Due Process: Burnham v. Superior Court[197]

Burnham was in the State of California on a transitory basis when he was served with process in a divorce proceeding. The question before the Supreme Court was whether assertion of jurisdiction on the basis of service of process on a person only temporarily in the forum, for a cause of action unrelated to that transient presence ("transient" jurisdiction), violates due process.[198] All Justices agreed that the assertion of transient jurisdiction in Burnham's case did not violate his due process rights. But there was substantial disagreement as to the proper analysis to be employed.

Justice Scalia, joined only by Chief Justice Rehnquist and Justice Kennedy on most crucial points, traced the historical treatment of transient jurisdiction and concluded that the rule of transient jurisdiction had been traditionally accepted and universally applied[199] until *Shaffer v. Heitner*.[200] In *Shaffer*, the Court held that presence-based quasi-in rem jurisdiction was unfair[201] and that assertions of quasi-in rem jurisdiction had to satisfy the minimum contacts test of *International Shoe*.[202]

Justice Scalia concluded that the use of transient jurisdiction satisfies due process as a per se matter. In Justice Scalia's view, there was no need to investigate whether transient jurisdiction could satisfy the minimum contacts test or whether or not the rule made sense. For Justice Scalia, transient jurisdiction automatically satisfies due process because it is one of the continuing traditions of our legal system that defines the due process standard.[203]

Justice Scalia contended that neither *International Shoe* nor *Shaffer* required the conclusion that service within the borders should be evaluated under the minimum contacts test. *International Shoe* permitted the use of extraterritorial service, so long as it was consistent with minimum contacts. But it did not purport to question the traditional, presence-based jurisdiction of *Pennoyer v. Neff*.[204] *International Shoe* added new methods by which plaintiffs could sue nonresidents but made no attempt to disturb the old. *Shaffer*, which

197. 110 S. Ct. 2105 (1990).
198. *See id.* at 2109.
199. *Id.* at 2109-15.
200. 433 U.S. 186 (1977).
201. *Id.* at 206-17.
202. *See id*; International Shoe Co. v. Washington, 326 U.S. 310 (1945).
203. *Burnham*, 110 S. Ct. at 2115.
204. 95 U.S. 714 (1878).

applied the minimum contacts test to quasi-in rem jurisdiction, could not in Justice Scalia's view fairly be read to obliterate by implication the traditionally accepted and uniformly applied doctrine of transient jurisdiction.[205]

Thus, Justice Scalia drew a bright line between nontraditional forms of jurisdiction (for example, extraterritorial service), which are evaluated under the minimum contacts test, and traditional forms of jurisdiction which per se satisfy due process without reference to the minimum contacts test: for transient jurisdiction, "its validation is its pedigree," and there is no independent inquiry into the desirability or fairness of the in-state service rule.[206] That question is left to state legislators.

Are there any limitations on Justice Scalia's traditionalist approach to due process? Justice Scalia's view is that the Court should keep its ear to the ground—if a substantial majority of states has rejected traditional methods as unfair, then the Court can take into account this march of progress. But this is not the case with transient jurisdiction, which was universally accepted until some courts erroneously assumed that it had been overruled by *Shaffer*. The erroneous deference of lower courts does not indicate an on-the-merits rejection of the traditional presence-based jurisdiction.

Justice Scalia supports his traditionalist view by arguing that "fairness" of a jurisdictional or any other procedure is best determined by the legislature rather than by the subjective notions of Justices as to what is fair and just.[207] If the procedure is unfair, it is up to the democratic processes to change it. This analysis is very reminiscent of Justice Black's minority opinion in *International Shoe*.[208]

It is clear that Justice Scalia is not enamored with a vague, case by case, unpredictable approach that tends to give judges room to legislate as to what they think is fair; this is especially so when the issue is a preliminary one, as to which clarity of application ought to be at a premium. Justice Scalia continually refers to the *International Shoe* test as one that is applied "at the margins."

Justice Scalia's presumption that the legislative process will

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205. *See Burnham*, 110 S. Ct. at 2116.

206. *Id.*

207. *See id.*

208. *See* International Shoe Co. v. Washington, 326 U.S. 310, 322 (1945) (Black, J., dissenting). It is also consistent with other opinions containing Justice Scalia's views on due process, *see* Michael H. v. Gerald D., 109 S. Ct. 2333 (1989); *see also* Carden v. Arkoma Assocs., 110 S. Ct. 1015 (1990) (setting forth his traditionalist views on subject matter jurisdiction).

pare out obsolete jurisdictional devices is suspect. Transient jurisdiction operates against nonresidents in favor of residents. There is no transient defendant lobby or transient defendant voting bloc to assure that the political process will actually take into account the unfairness (if such it is) of a traditional basis of jurisdiction over nonresidents.[209]

In *Shaffer* the Court specifically declined to give deference to the rule of presence-based quasi-in rem jurisdiction solely because it was traditional. The Court stated that traditional bases of jurisdiction can become unfair and outmoded over time.[210] Justice Scalia admits that his approach is different from that used in *Shaffer*, and there is little doubt that if he sat on the Court at that time, he would have voted to uphold the universally accepted and traditional doctrine of presence-based quasi-in rem jurisdiction. Justice Scalia's attempt to distinguish *Shaffer* as a case where the form of jurisdiction was engaged in by only a few states is unpersuasive by his own admission.[211] While the Delaware statute in *Shaffer* was unique in that it established a novel rule of presence, the presence-based jurisdiction asserted by the Delaware court was itself widely accepted before *Shaffer*. Ultimately, Justice Scalia was forced to conclude that his basic approach to due process was "different" from that used in *Shaffer*.

Justice White, concurring in the judgment, took a slightly different approach from Justice Scalia. To Justice White, the fact that transient jurisdiction is traditional and well accepted establishes a very heavy presumption of constitutionality. Unlike Justice Scalia, however, Justice White would not find traditional rules to satisfy due process automatically. In Justice White's view, if it can be shown that the rule is completely arbitrary and lacking in common sense in most instances, then it may be held violative of due process. But according to Justice White, such a showing would be extremely difficult to make. And until it is made, it makes no sense to apply a case-by-case approach, when transient jurisdiction reaps the benefits of clarity and is not totally arbitrary as a general rule.[212]

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209. *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 84-87 (arguing that minimum contacts test is necessary to protect nonresidents because they lack political power in the state legislature).

210. *See* Shaffer v. Heitner, 433 U.S. 186, 211-12 (1977) ("traditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage").

211. Burnham v. Superior Court, 110 S. Ct. 2105, 2116 (1990).

212. *See id.* at 2119-20 (White, J., concurring)

Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor, also concurred in the judgment. Justice Brennan argued for a case-by-case review. He stated that while history is important, the pedigree of a rule is not dispositive; to hold thus is contrary to the Court's analysis in *Shaffer*. Justice Brennan contended that transient jurisdiction is "as a rule" consistent with due process: i. It can be anticipated by defendant that if he enters a state, he could be served there. ii. By visiting a state, the defendant avails himself of benefits. iii. Burdens of distant litigation are slight, given modern ease of transportation, the fact that the defendant has already once traveled to the forum, and the possibility of procedural devices to protect against inconvenience such as change of venue, forum non conveniens, and deposition by telephone.[213]

Justice Scalia's critique of Justice Brennan's analysis contains much that is persuasive:

1. To say that transient jurisdiction is fair "as a rule" is not a rule, but a presumption. If the presumption can be overcome on a case-by-case approach, much of the benefit of clarity of the in-state service rule would be lost.[214]

2. The benefits to transient defendants that are articulated by Justice Brennan apply to anybody who has visited a state, whether or not they were ever served there (for example, health and safety guaranteed by police, travel on roads, protections of the courts). If, as all agree, Burnham would not be subject to extraterritorial service because it would be unfair, what about the fact that he was served within the state makes it fair? It has nothing to do with benefits.[215]

3. A defendant who enters the state may have fair notice of the possibility of transient jurisdiction, but that is only because transient jurisdiction is a predominant rule of law that the defendant is charged with knowing. The concept of anticipation is tautological: a citizen's anticipation is based upon the antecedent rule of law. A jurisprudence that protects societal expectations cannot tell you what the law ought to be.[216]

Justice Stevens, concurring in the judgment, refused to enter the fray. He contended that transient jurisdiction satisfied due pro-

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213. *See id.* at 2120-25 (Brennan, J., concurring).

214. *See id.* at 2118-19.

215. *See id.* at 2117.

216. *See id.* at 2117-18; Capra, *Conceptual Limitations on Long-Arm Jurisdiction* (Book Review), 52 FORDHAM L. REV. 1034, 1054 (1984) (noting the circular and question-begging nature of a jurisdictional system based on expectations).

cess because of all the considerations in the prior opinions. Justice Stevens gave no indication, however, that he was willing to do a case-by-case analysis of the fairness of transient jurisdiction.[217]

Implications of Burnham.—*Burnham* shows that the majority of Justices has held that so long as the defendant's presence in the state is purposeful, which is almost always the case, transient jurisdiction comports with due process and a case-by-case approach is unwarranted.

It is possible that Justice Scalia's dissatisfaction with the malleability and vagueness of the minimum contacts test may lead to the Court's adoption of more bright line rules of personal jurisdiction—for example, per se amenability for physical negotiation or execution in the state in interstate contract cases.[218] In his concurring opinion in *Sisson v. Ruby*,[219] Justice Scalia stressed the need for clear rules for preliminary matters such as jurisdiction. After *Burnham*, any procedure that is both traditional and well accepted will carry a heavy if not irrebuttable presumption of constitutionality.[220]

Finally, Justice Scalia implies in various footnotes that there may be several limitations on general jurisdiction—jurisdiction over a defendant with respect to causes of action unrelated to the defendant's contacts in the state.[221] Justice Scalia implied, for instance, that general jurisdiction may not allow for extraterritorial service. Justice Scalia notes that *Perkins v. Benguet Consolidated Mining Co.*[222] is the only Supreme Court case that upheld general jurisdiction, and in that case the president of the corporation was served within the borders. There is also a strong implication that general jurisdiction may only apply to corporations. Some courts have held that general jurisdiction may be asserted over individuals.[223] In *Burnham*, Justice Scalia intimates that general jurisdiction may be necessary only insofar as it deals with corporations, which have never fit comfortably

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217. *Burnham*, 110 S. Ct. at 2126 (Stevens, J., concurring).

218. *See, e.g.*, Burger King Corp. v. Rudewicz, 471 U.S. 462 (1985).

219. 110 S. Ct. 2892, 2902 (1990). *See supra* notes 127-161 and accompanying text.

220. *See generally* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), also written by Justice Scalia, which held that neither the full faith and credit clause nor the due process clause prevents a state from applying its own rules traditionally considered procedural (such as the statute of limitations) to cases brought in the forum. *See also* the discussion concerning the emphasis on traditional analysis as to limited partnerships in diversity in *Carden v. Arkoma Associates*, *supra* notes 110-117 and accompanying text.

221. *See Burnham*, 110 S. Ct. at 2110 n.1.

222. 342 U.S. 437 (1952); *see* 110 S. Ct. at 2110 n.1.

223. *See, e.g.*, Abkco Indus., Inc. v. Lennon, 52 A.D.2d 435, 439-40, 384 N.Y.S.2d 781, 783-84 (1976).

into presence-based notions of jurisdiction.[224]

IV. JUSTICIABILITY

In the 1989-90 term, the Supreme Court decided six cases that dealt in whole or part with justiciability issues. None of the cases were doctrinally revolutionary (though there are at least implications in *United States Department of Labor v. Triplett*,[225] that may lead to a revision of the jus tertii doctrine). But several of the cases continued a trend toward strict application of standing and mootness requirements, as functions of judicial restraint and the separation of powers. And one case represented a welcome simplification of the act of state doctrine.

A. *Environmental Standing and the Requirement of Specific Averments of Harm*: Lujan v. National Wildlife Federation[226]

The National Wildlife Federation challenged the actions of the Bureau of Land Management that allowed certain public lands to be available for private uses such as mining. These actions were taken by the Bureau pursuant to an informally-described "land withdrawal review program."[227]

In order to establish standing under section 702 of the Administrative Procedure Act (APA),[228] the Federation submitted affidavits from two of its members to the effect that they used public lands "in the vicinity" of lands covered by two decisions of the Bureau.[229] The district court initially denied a motion to dismiss but later granted summary judgment for the Bureau, finding the members' allegations insufficiently specific to confer environmental standing under APA section 702.[230] The district court also rejected as untimely four other member affidavits that were more specific, and that were submitted after argument on the summary judgment motion in

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224. *See Burnham*, 110 S. Ct. at 2110 n.1. For a thorough discussion of general jurisdiction, see Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

225. 110 S. Ct. 1428 (1990).

226. 110 S. Ct. 3177 (1990).

227. *Id.* at 3182-83.

228. 5 U.S.C. § 702 (1988).

229. *Cf.* Newark Branch, NAACP v. Harrison, New Jersey, 907 F.2d 1408 (3d Cir. 1990) (NAACP had no standing in suit against residency requirement for township jobs, since no member alleged particular facts to show standing, *e.g.*, that member applied for or was deterred from applying for job). The Federation submitted its affidavits in order to avoid the problem the NAACP faced.

230. *See* National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985), *aff'd*, 844 F.2d 889 (D.C. Cir. 1988).

purported response to the court's request for further briefing.[231]

Justice Scalia, writing for five members of the Court, held that the original affidavits were insufficiently specific to survive a summary judgment motion on standing, and that the district court did not abuse its discretion in refusing to accept the untimely submission of additional members' affidavits.[232]

Under section 702 of the APA, there must be an allegation of actual use of the affected lands; the injury alleged may be to one's aesthetic or recreational interests, but the interest must be expressible in concrete terms resulting from personal use.[233] According to the majority, the original affidavits in *Lujan* did not suffice for concrete injury, since there was no allegation of actual use of the land specifically affected by the Bureau's decision. Allegations of use in "the vicinity" were not specific enough to survive summary judgment, given the vast tracts of land in which the Bureau was operating.[234] Thus, the majority did not deny that interests in recreational use and aesthetic enjoyment are sufficient to confer environmental standing. Rather, the subject affidavits did not in the Court's view specifically allege an injury to those interests because there was no allegation that the affiants used the specific tracts of land that were affected by the Bureau's program.[235]

The circuit court had found the affidavits specific enough to survive summary judgment, reasoning that the affidavits would have been meaningless if they were not meant to refer to the affected land. The circuit court drew an inference favorable to the plaintiff that they would not prepare a superfluous affidavit.[236] But the majority rejected this approach as inconsistent with the law of summary judgment. Under rule 56 of the Federal Rules of Civil Procedure, a district court resolves *factual issues of controversy* in favor of the nonmoving party. It does not draw an inference about facts that are not specifically put in the record by the plaintiff. It is the plaintiff's bur-

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231. *See* National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989).

232. *See Lujan*, 110 S. Ct. 3177, 3188, 3193 (1990).

233. *See* Sierra Club v. Morton, 405 U.S. 727 (1972) (standing requires individualized harm to an organization or its members, not merely a public interest). *Cf.* Alabama v. EPA, 871 F.2d 1548 (11th Cir. 1989) (threat to environmental quality of Alabama was sufficient injury-in-fact, but causal connection between that injury and alleged wrongdoing—denying an opportunity to participate in choice of remedial action—was insufficient).

234. *Lujan*, 110 S. Ct. at 3189.

235. *See id.* at 3187-88.

236. *See* National Wildlife Fed'n v. Burford, 878 F.2d 422, 431 (D.C. Cir. 1989), *rev'd*, 110 S. Ct. 3177 (1990).

den to set forth specific facts, and this burden cannot be satisfied by inference. The Court concluded that "the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues."[237] According to the majority, the defendant did not receive such a sworn averment of a specific fact in either affidavit.

The contention of the circuit court in *Lujan* that the affidavit "must have meant that" or it would be worthless proves too much. It would mean that plaintiff would never have to set forth specific facts, which is directly contrary to the specificity standards of rule 56.[238] The Supreme Court noted that a different result may occur on a rule 12(b) motion to dismiss, since the court on such a motion is to presume that general allegations cover specific facts necessary to support the claim.[239]

As to the four supplemental affidavits, the majority first noted that even if they were accepted, they would not establish a right to challenge the entire land withdrawal review program of the Bureau of Land Management. Rather, the plaintiff would be entitled to challenge only those decisions affecting the lands as to which actual use was averred. The Court reasoned that the entire program of land withdrawal was not a "final agency action" subject to review under section 702 of the APA. Rather, the final agency action is each specific action that is taken pursuant to the program. Moreover, allowing programmatic review would be contrary to principles of ripeness, since it would result in invalidating actions that may never take place. The majority recognized that sweeping programmatic relief may be more efficient, but argued that such sweeping changes must be left to the legislative branches.[240]

The majority held that at any rate, the district court had not abused its discretion in refusing to consider the supplementary affidavits as untimely.[241] The plaintiffs' confidence in their own standing until it was too late (even though such confidence may have

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237. *Lujan*, 110 S. Ct. at 3188-89.

238. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

239. *See Lujan*, 110 S. Ct. at 3189. *See also* United States v. SCRAP, 412 U.S. 669 (1973) (attenuated claims of injury sufficient to confer environmental standing against rule 12(b) motion to dismiss).

240. *See Lujan*, 110 S. Ct. at 3189-91.

241. *See id.* at 3192; *cf.* Newark Branch, NAACP v. Harrison, New Jersey, 907 F.2d 1408 (3d Cir. 1990) (affirming dismissal of civil rights complaint for failure to allege standing with particular facts, but finding that district court had erred in believing it did not have discretion to grant leave to amend complaint).

come from surviving a motion to dismiss and the granting of a preliminary injunction) does not require a finding of cause for the delay in submitting more affidavits concerning standing. Justice Scalia contended that a litigant is never justified in assuming that a court has made up its mind until it rules to that effect.[242]

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented in *Lujan*. The dissenters argued that while the affidavits were not models of precision, they were sufficiently specific to withstand a summary judgment motion. They alleged harm, and they defined the tract that was affected by the Bureau. Since the only question on summary judgment is whether there is a genuine issue for trial, the dissenters argued that this limited threshold had been met without the need to refer specifically to use of the specifically affected land.[243]

The dissent further contended that the district court abused its discretion in refusing to consider the supplementary affidavits. According to the dissent, the plaintiff had no reason to submit additional material until after the summary judgment hearing, since it had continually been assured by the district court (such as by the granting of a preliminary injunction) that its submissions on standing were sufficient.[244]

Implications of Lujan.—In *Lujan*, the Court reaffirms the more aggressive approach toward summary judgment that it instituted in the 1986 trilogy of rulings in that area.[245] Specific facts are required and will not be inferred. Those facts must be within the four corners of the affidavit. Moreover, late submissions in opposition to summary judgment do not have to be routinely permitted, and

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242. *See Lujan*, 110 S. Ct. at 3193.

243. *See id.* at 3194-96 (Blackmun, J., dissenting).

244. *See id.* at 3196-201.

245. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (factual claims that are "implausible" will not overcome a motion for summary judgment); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (party opposing summary judgment must demonstrate the existence of a factual dispute that would support a verdict in its favor, applying the substantive standard of proof to be used at trial; and evidence opposing summary judgment must be of sufficient probative value to withstand a directed verdict motion); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (summary judgment burden required only that the moving party point out in the record the lack of evidence to support a contention in the complaint, not affirmatively demonstrate the opposite contention). For commentary on the 1986 trilogy, see Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

cause for delay is not to be found merely because the litigant has been assured implicitly by the court of a favorable ruling.

The Court continues its strict requirement of specific allegations of concrete harm for environmental standing. The attenuated "but for a nail" allegations of *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*[246]—that a railroad rate increase would cause use of nonrecyclable commodities, which would in turn divert natural resources out of the area and into the manufacturing process, which would in turn cause more litter in parks used by plaintiffs—are distinguished as surviving only a rule 12(b) motion; but the Court also states that *SCRAP*'s expansive expression of standing "has never since been emulated by this court."[247]

Finally, the Court emphasized the limited nature of agency review under the APA. Just because something may be called a program does not mean that a single litigation will result in across-the-board relief.[248]

B. Specific Pleading of Injury in Fact: FW/PBS, Inc. v. City of Dallas[249]

Certain individuals and businesses instituted a first amendment challenge against an ordinance of the City of Dallas that regulated sexually oriented businesses.[250] Standing problems arose with respect to two provisions in the ordinance: (1) The ordinance prevents a spouse of one whose license was denied or revoked from receiving a license to operate a sexually oriented business; the disabling is for a year from the spouse's denial. (2) The ordinance denies a license to those who committed a specified felony or misdemeanors within a certain period.[251]

Justice O'Connor, writing for five members of the Court, held that none of the plaintiffs had standing to challenge these provisions since none of them specifically alleged an injury-in-fact with respect to them.[252] Justice O'Connor emphasized that the burden rests on the party seeking standing to prove it from affirmative facts in the

246. 412 U.S. 669 (1973).

247. *Lujan*, 110 S. Ct. at 3189.

248. *Id.* at 3190-91.

249. 110 S. Ct. 596 (1990)

250. *See* DALLAS CITY CODE, ch. 41A, Sexually Oriented Businesses, § 41A-2(19) (1986).

251. *See City of Dallas*, 110 S. Ct. at 599.

252. *See id.*; *see generally* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979). For a complete discussion of the "injury in fact" requirement of standing, and a proposed adjustment of traditional

record. As the Court also emphasized in *Lujan*, a clear allegation of facts supporting standing is required. In *City of Dallas*, the parties did not dispute standing. Nevertheless, the Court held that the injury-in-fact requirement is mandated by article III, and hence is a jurisdictional requirement that the Court is obliged to raise *sua sponte*.[253]

Upon examining the plaintiff's standing to challenge the spousal disability provision, the majority found none because no parties were spouses of anyone who was denied a license. The status of one spouse as an officer of a corporation affected by the ordinance did not create standing since the officer was not a party to the action. Even if that spouse had been a party, Justice O'Connor found that her grievance would have been moot since the offenses of which her spouse was convicted had in the interim been taken off the list of disqualifying convictions.[254]

In support of standing regarding the personal disability provision, there were allegations of harm by a convicted petitioner. But the majority found such allegations insufficiently specific to confer standing, because that petitioner made no affirmative statement that his convictions were still within the disabling time period. As in *Lujan*, the Court found it improper to draw specific inferences from general factual allegations, requiring that there be specific allegations in the complaint that show an injury-in-fact.

Seeking to preserve the controversy, the parties submitted at oral argument in the Supreme Court that some of the petitioners were subject to the disabling provisions, but the majority rejected this submission as irrelevant. The Court held that facts concerning standing must be in the record of the proceedings below.[255]

Justice Stevens dissented from the majority's strict construction on standing. He agreed that standing had not been proved, but argued that the breadth of the provisions in the ordinance and the ambiguity of the evidence mandated an evidentiary hearing on standing rather than outright dismissal.[256]

Justices Brennan, Marshall, and Blackmun refused to join the majority's opinion on the standing issue. Justice Brennan objected to the majority's overriding the findings of two lower courts (while

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standing doctrine, see Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

253. *City of Dallas*, 110 S. Ct. at 607-08.

254. *See id.* at 609.

255. *See id.* at 609-10.

256. *See id.* at 617-25 (Stevens, J., concurring in part, dissenting in part).

the majority contended no ruling on standing was made below).[257]

Justice Brennan asserted that at any rate the majority's discussion on standing was dictum, since the first amendment procedural safeguards used to invalidate part of the ordinance in an earlier part of the majority opinion would by definition invalidate the disability provisions.[258] Thus, he said the issue of standing did not have to be decided. But if the issue is jurisdictional, it would seem that it must be decided. Arguing that the merits of another issue would apply to one on which no party has standing improperly presumes there is jurisdiction to decide the second issue.

Implications of City of Dallas *as to Standing.*—In *City of Dallas* no new test on standing is instituted, but, together with *Lujan*, the Court is indicating that strict rules of construction should apply to a plaintiff's averments on standing, specifically as to a showing of injury-in-fact. No inferences are to be derived, and no common sense construction is to be undertaken. The plaintiff must show specifically all the elements by which injury-in-fact is created.

C. *Attenuated Injury, and Limits on "Next Friend" Standing:* Whitmore v. Arkansas[259]

Ronald Simmons waived his right to direct appeal of his conviction and death sentence. The trial court conducted a hearing and found that Simmons was competent to make such a waiver. Whitmore, a fellow death-row inmate, sought to intervene in Simmons' proceeding both individually and as "next friend" of Simmons. The Arkansas courts denied Whitmore's petition. In the Supreme Court, Whitmore contended that the state was required by the eighth amendment to conduct appellate review of Simmons' conviction.[260]

Chief Justice Rehnquist, writing for a seven-person majority, held that Whitmore lacked standing to bring this claim, either in his individual capacity or as "next friend" of Simmons. According to the Court, Whitmore had no standing to bring the claim on his own behalf, since any injury to him from Simmons' execution would be

257. *See id.* at 611-14 (Brennan, J., concurring).

258. *See id.* at 612-13. The bulk of the opinion in *City of Dallas* is devoted to a first amendment analysis of certain parts of the ordinance. However, the disability provisions in the ordinance were not addressed on the merits due to lack of standing of any petitioners to challenge such provisions.

259. 110 S. Ct. 1717 (1990).

260. *See id.* at 1721-22.

too attenuated to constitute injury-in-fact.[261]

The direct injury alleged by Whitmore was that Arkansas conducts a comparative review in death penalty cases, and that if Simmons' multiple murder of his family were excluded from the data base, Whitmore may be sentenced to death when otherwise he would not be. The Court found this alleged injury to be too speculative to rise to an injury-in-fact. Whitmore had already been sentenced to death, so any new comparison would have to occur after a successful habeas petition, retrial, conviction, and another death sentence. Moreover, Whitmore made no showing that Simmons' crime would affect the Arkansas court's review of Whitmore's crime in any meaningful way. After all, Whitmore stabbed his victim ten times, cut her throat, and carved an "X" on her face. Whitmore was not in the gray area of capital punishment in Arkansas.[262]

Again, as in *Lujan*, the attenuated harm held sufficient in *SCRAP* is recognized by the majority as being on the outer reaches of the law, and explained as being in the context of a motion to dismiss, where plaintiffs at least alleged that the harm would be imminent. There is clearly no such imminence in this case.

The Court rejected the argument that an exception to traditional standing doctrine should be made for capital cases: "The short answer to this suggestion is that the requirement of an Art. III 'case or controversy' is not merely a traditional 'rule or practice,' but rather is imposed directly by the Constitution."[263]

The majority also rejected Whitmore's claim of standing as "next friend" of Simmons. The Chief Justice stated that the "next friend" doctrine, found in federal common law, has been an approved exception to limitations on standing.[264] However, the next friend exception does not apply to anyone who wishes to bring a claim on behalf of someone else. Rather, it is premised on the inability of the real party in interest to appear on his own behalf. Since Simmons had been found competent to waive his right to appeal, the "next friend" doctrine could not apply.

Justice Marshall, joined by Justice Brennan, dissented. Justice Marshall argued that the limitations on the "next friend" doctrine should be relaxed for death penalty cases; otherwise the Court would "permit an unconstitutional execution on the basis of a com-

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261. *See id.* at 1729.

262. *Id.* at 1723-24.

263. *Id.* at 1726.

264. *See id.*; *see, e.g.*, Toth v. Quarles, 350 U.S. 11 (1955) (prisoner's sister brought habeas proceeding while he was being held in Korea).

mon law doctrine that the Court has the power to amend."[265]

Implications of Whitmore.—*Whitmore*, together with *Lujan* and *City of Dallas*, stands for the proposition that the attenuated harm alleged in cases like *SCRAP* no longer will be tolerated. When injury-in-fact depends on the happening of one or more contingencies, it is likely that standing will not be found.[266]

D. *Mootness Due to Intervening Change of Law, and Standing on Remaining Issues*: Lewis v. Continental Bank Corp.[267]

Continental Bank, an out-of-state holding company, filed an application with the Florida Department of Banking and Finance to establish an industrial savings bank in Florida, to be insured to the maximum extent allowable by the FDIC. Relying on Florida law, the comptroller of the State of Florida refused to process the application.[268] Continental brought a section 1983 action claiming a violation of the commerce clause. The district court held that the Florida exclusion violated the commerce clause. Continental moved for attorney's fees as a prevailing party under 42 U.S.C. section 1988. The district court denied that motion.[269]

After the district court entered judgment, the Bank Holding Company Act (BHCA)[270] was amended to expand the definition of "bank" to include banks such as the one Continental proposed, and therefore, refusal to process Continental's application was authorized by federal law.[271] The Eleventh Circuit held that the intervening change in law had not mooted the case, since it could not determine what the parties would do in light of the amendment.[272]

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265. *Whitmore*, 110 S. Ct. at 1729 (Marshall, J., dissenting).

266. The Eleventh Circuit came to a comparable result in *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), where a mother challenged the Health and Human Services secretary's and the state's failure to vigorously enforce child support laws. The mother argued injury-in-fact as a loss of money as well as a paternity determination. But this injury was attentuated since even the most vigorous enforcement of the child support laws does not guarantee that any father will be located and, if so, that any child support will be collected. The presence of so many contingencies prevented a finding of injury-in-fact.

267. 110 S. Ct. 1249 (1990).

268. The comptroller contended that two Florida Statutes, prohibited out-of-state banks from operating industrial savings banks in Florida. *See* FLA. STAT. § 658.29(1) (Supp. 1980); FLA. STAT. § 664.03(14) (Supp. 1980).

269. *See Lewis*, 110 S. Ct. at 1252.

270. 12 U.S.C. § 1842 (1989).

271. *See* 12 U.S.C. § 1841(c)(1)(A) (1988) (amending 12 U.S.C. § 1841(c) (1956)).

272. Continental Illinois Corp. v. Lewis, 827 F.2d 1517, 1523 (1988), *rev'd*, 110 S. Ct. 1249 (1990).

Justice Scalia, writing for a unanimous Court, held that the intervening change in federal law rendered the controversy moot, since Continental Bank admitted that under the amended BHCA, Congress had given the states the power to exclude FDIC-insured banks owned by nonresident holding companies.[273] The Court also rejected Continental's argument that a sufficiently live controversy remained because of Continental's desire to open an uninsured bank in Florida, which would not be covered by the power-to-exclude provision.[274]

The Court began its analysis by stating its standard test of article III limitations on judicial power: there must be an actual injury-in-fact that is likely to be redressed by a favorable judicial decision. The Court also noted the standard rule that even if a case starts out as a live controversy, it may be mooted by subsequent developments, such as a change in the law, settlement, or the like.[275]

In *Lewis*, the Court found that there was no likelihood of redress from a judicial decision due to the intervening change in law that gives the State Comptroller an absolute right to exclude all FDIC-insured banks owned by nonresidents. The federal statute does not allow exclusion of uninsured banks, so that an open issue would remain if an out-of-state bank sought to establish an uninsured bank in Florida. But the Court found that at the present stage of this litigation, there was no live controversy between these parties on that issue. Justice Scalia concluded that Continental Bank's application to the Comptroller, fairly read, referred only to an intent to establish an insured bank. Thus, allowing Continental to obtain injunctive relief against the Florida Comptroller with respect to uninsured banks would not redress an injury-in-fact to Continental. The Court noted that while Continental may in the future decide to open an uninsured bank, the same is true for every bank in the country: the possibility of making a future decision does not constitute a concrete stake in the action as is required by article III.[276]

At the Supreme Court level, Continental attempted to supplement the record by submitting affidavits concerning its intent to open an uninsured bank. The Court treated such an ex parte offer skeptically, considering the attempt as a bid to keep moot litigation

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273. *See Lewis*, 110 S. Ct. at 1254.

274. *See id.* at 1255.

275. *See id.* at 1253. *See also* Allen v. Wright, 468 U.S. 737, 750-51 (1984); Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 471-73 (1982).

276. *See Lewis*, 110 S. Ct. at 1254-55.

alive so that an award of attorney's fees could be granted. The Court stated that a litigant's interest in attorney's fees does not create an article III controversy where the underlying claim is not justiciable.[277]

Continental argued that its suit remained justiciable even if it did not have a concrete interest in the application of the statute to uninsured banks, on the ground that its dispute with Florida was "capable of repetition, yet evading review."[278] Justice Scalia found this contention to be "twice wrong." The dispute brought by Continental was not capable of repetition, since due to the intervening law, there would never be an issue to litigate with respect to the exclusion of insured banks.[279] As to exclusion of uninsured banks, Continental had not demonstrated that it had ever suffered such a wrong, which showing is required to meet the "capable of repetition" exception to mootness.[280] Nor did the dispute evade review, since the denial of an application to open a bank is not of short term duration (as was the pregnancy, for instance, in *Roe v. Wade*). If Continental were later to apply for and then be denied a charter to open an uninsured bank, there would be plenty of time to review the legality of the denial.[281]

The final question in *Lewis* was the proper way to dispose of the case after a finding of mootness. The Court held that where mootness results from an intervening change in law, and the plaintiff may have some residual claim that it could not have been expected to allege under prior law, the case should not be dismissed as moot. Justice Scalia stated that the proper remedy under such circumstances is to vacate the judgment and remand for further proceedings to allow the parties to develop a record in light of the new legal landscape. That principle applied in *Lewis*, where Continental could not have been expected to develop a record concerning its intent to open an uninsured bank, prior to the amendment that provided that such a bank is the only type that Continental would have the right to

277. *See id.* at 1255. *See also* Diamond v. Charles, 476 U.S. 54, 70-71 (1986).

278. *Lewis*, 110 S. Ct. at 1255. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (suits for prospective relief can go forward despite abatement of injury in exceptional situations where the challenged action is too short in duration to be litigated and likely to recur).

279. *See Lewis*, 110 S. Ct. at 1255.

280. *See* Roe v. Wade, 410 U.S. 113, 125 (1973) ("capable of repetition" exception applied to plaintiff who had been denied the right to an abortion; plaintiff must show that wrong that would recur had already been suffered).

281. *Lewis*, 110 S. Ct. at 1256.

open.[282]

Implications of Lewis.—*Lewis* is exemplary of a strict construction of justiciability requirements. Standing to assert the uninsured bank issue could have been squeezed out of the submissions before the Court, but the Court refused to read those submissions broadly.

Lewis leaves several open questions concerning attorney's fee awards under section 1988. These questions arose because Continental's attempt to preserve a live controversy was spurred largely by a desire to recover attorney's fees. The issues were left open because the judgment in favor of Continental was vacated on the basis of an event that mooted the controversy before the court of appeals' judgment issued. Consequently, Continental was not a "prevailing party" entitled to attorney fees.[283]

Thus, one question left open is whether section 1988 allows attorney's fees to be recovered for commerce clause violations. There is nothing in the statute that distinguishes between types of section 1983 claims; so while the Court in *Lewis* left the issue open, there appears to be no reason to prohibit attorney's fees in a commerce clause challenge.

Another open question is whether fees can be recovered if plaintiff prevails at trial, and the judgment is mooted after being rendered but before the judgment can be challenged on appeal. The Court noted that this is a question of some difficulty.[284] In *Williams v. Alioto*,[285] the Ninth Circuit held that where a preliminary injunction against pat-down searches was mooted during appeal because the pat-down operation had terminated, attorney's fees could still be awarded since plaintiffs won their case.[286] *Williams* can be distinguished from *Lewis* in that the mooting event (cessation of the searches) resulted in victory for the plaintiffs. In *Lewis*, the mooting event (the intervening law) resulted in defeat for the plaintiff. The plaintiffs in *Williams* can legitimately be considered "prevailing parties" where the plaintiff in *Lewis* cannot.

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282. *Id.*

283. *See* Rhodes v. Stewart, 488 U.S. 1 (1988) (defining prevailing party as one who has been afforded relief, not simply a declaratory judgment).

284. *See Lewis*, 110 S. Ct. at 1256. *See generally* Comment, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. CHI. L. REV. 819 (1982).

285. 625 F.2d 845 (9th Cir. 1980).

286. *See id.* at 847.

E. Third Party Standing, and Review of State Court Decisions That Do Not Comport with Federal Standing Requirements: United States Department of Labor v. Triplett[287]

A disciplinary proceeding was brought against an attorney for collecting fees in excess of the amount allowed by the Black Lung Benefits Act.[288] The disciplinary committee brought a proceeding in a West Virginia state court to enforce its recommended six month suspension. The state court denied enforcement on the ground that the limitations on attorney's fees in the Black Lung Benefits Act violated the due process rights of black lung claimants. The state court reasoned that the limitations deprived such claimants of access to counsel that was necessary to bring their claims.[289]

At the Supreme Court, one issue was the standing of both the disciplinary committee and the attorney. Justice Scalia, writing the majority opinion, held that both the committee and the attorney had standing to bring their claims.[290]

The Court was unanimous that the disciplinary committee had standing to challenge the state court's rejection of suggested discipline. This rejection satisfied the injury-in-fact test. The committee had the "classic interest of a government prosecuting agency arguing for the validity of a law upon which its prosecution [was] based."[291] This injury would be redressed by a favorable decision, since if the attorney's fee limitations were upheld (which they were, unanimously), the prosecution could proceed.

While the Court unanimously agreed that the attorney had standing to challenge the proposed discipline, there was dispute among the Justices as to the proper mode of analysis. According to the majority, the attorney was not invoking his own rights, but those of black lung claimants to assistance of counsel.[292] This brought into question the prudential limitations on third party standing. Even though there is an injury-in-fact that satisfies article III (the attorney would be subject to discipline), the Court has established prudential limitations on a litigant's asserting the rights of others.[293]

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287. 110 S. Ct. 1428 (1990).

288. 30 U.S.C. §§ 901-945 (1988).

289. *See* Committee on Legal Ethics v. Triplett, 378 S.E.2d 82, 85 (W.Va. 1988). In *Triplett*, the Supreme Court rejected this reasoning and held that the fee limitations did not violate due process because the attorney could not prove that the scheme made attorneys unavailable for Black Lung claimants. *See* 110 S. Ct. at 1432.

290. *See Triplett*, 110 S. Ct. at 1431-32.

291. *Id.* at 1431.

292. *See id.*

293. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing involves both constitu-

Justice Scalia recognized an exception to the prudential limitations on third party standing: when enforcement against the litigant prevents third parties from entering into a relationship with that litigant, and the third party allegedly has the legal right to such relationship.[294]

Commentators have explained this "exception" to third party standing limitations as not involving third party standing at all, but rather involving first party rights: if the litigant complies with an imposed duty that would prevent another from exercising a legal right, there is a justiciable issue about the permissibility of the choice imposed upon the litigant (i.e., to violate the law or deprive another of a legal right); and such a forced choice between legal rights implicates the litigant's interests directly.[295]

The majority found this exception to third party standing limitations applicable in this case, since the attorney was claiming that fee limitations would prevent black lung claimants from retaining an attorney; and there is clearly a due process right to representation at issue in such circumstances.[296]

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tional limitations on federal court jurisdiction and prudential limitations on its exercise); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 108 (2d ed. 1988) (noting prudential limitations on: i. generalized grievances appropriately addressed by the representative branches; ii. claims asserting the rights or interests of third parties; iii. claims not falling within the zone of interests to be protected by the guarantee in question; and iv. claims asserted by organizations on behalf of members); Brilmayer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297 (1979) (arguing that third party standing limitations are based in restraint, self-determination, and representation). These three considerations in turn avoid premature decisions; respect the apparent interest of third parties who do not wish their claims to be brought; and recognize that third parties are in the best position to bring their own claims vigorously.

294. *See Triplett*, 110 S. Ct. at 1432. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 195 (1976) (beer vendor has third party standing to invoke the rights of male beer buyers in challenging a state law prohibiting beer sales to males under 21 but permitting sales to females over 18); Playboy Enters. v. Public Serv. Comm'n, 906 F.2d 25, 36 (1st Cir. 1990) (cable programmer had standing to invoke federal statutory right of cable operators to be free from liability for obscene programming).

295. *See* Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 297-304 (1984), *quoted in Playboy Enters.*, 906 F.2d at 39 n.13.

> A question could be raised whether this case even presents a third party standing issue. Prosecution of cable operators . . . effectively restricts PEI's statutory right of access [to broadcasting], so why isn't PEI actually suing to protect its own right? Professor Monaghan . . . argues that when a third party's rights are threatened in a manner that impairs its interaction with the plaintiff or first party, the first party may assert, as its own, the right to be free from the interference . . . . This analysis strongly suggests that when a third party's right or immunity directly benefits the party claiming standing, that party has standing to sue on its own behalf, and need not establish an exception to the *jus tertii* prohibition.

296. *See Triplett*, 110 S. Ct. at 1432.

Justice Marshall, concurring in the judgment, did not disagree with the majority's analysis of the "relationship" exception to third party standing limitations, but argued that it need never have been undertaken.[297] According to Justice Marshall, if the petitioner in the Supreme Court has standing (as the disciplinary committee did here), the Court has jurisdiction on appeal from a state court judgment even if respondent would not satisfy federal standing requirements.[298] Justice Marshall relied on the recent case of *ASARCO, Inc. v. Kadish*[299] for the proposition that so long as the petitioner in the Supreme Court has standing, the respondent need not satisfy federal standing requirements to warrant jurisdiction on certiorari from a state court judgment.

The principle asserted by Justice Marshall derives from the rule that state courts are not bound to apply federal standing requirements.[300] This is because federal standing requirements proceed from constitutional and institutional concerns peculiar to the federal judiciary.[301] Yet if review of a state interpretation of federal law were limited by federal standing requirements, the state would be indirectly but effectively bound by federal standing limitations. The unavailability of federal review on a federal issue would deprive the state court ruling of res judicata effect.[302] So as a practical matter, federal standing requirements would be imposed on the states, since they would have to meet them to render a binding judgment on federal issues.

The majority responded to Justice Marshall on this point by arguing that the rule enunciated in *ASARCO*, while applicable to the injury-in-fact requirement of standing, should not apply where the standing issue is whether respondent can raise the claims of third parties. Justice Scalia explained the distinction as follows: while the state court is free to hear disputes which would not qualify as cases or controversies (the injury-in-fact question), it is not allowed to create a cause of action by granting third party standing where federal law would not (the jus tertii question).[303]

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297. *See id.* at 1436-38 (Marshall, J., concurring).

298. *See id.* at 1438.

299. 490 U.S. 605 (1989).

300. *See id.* at 617. *See also* Doremus v. Board of Educ., 342 U.S. 429, 434 (1952) (suggesting that a state court may render an opinion on a federal constitutional question "even under such circumstances that it can be regarded as only advisory").

301. *See ASARCO*, 490 U.S. at 617.

302. *Id.* at 621 (state court judgment on a federal issue normally has collateral estoppel effect in federal court only if the state court judgment was subject to federal review).

303. *See Triplett*, 110 S. Ct. at 1432 n.**.

Justice Scalia's distinction between injury-in-fact and jus tertii limitations on standing indicates that he has rethought the problem of third party standing. According to Justice Scalia, where third party standing is granted it in effect creates a cause of action for the litigant on the basis of third party rights.[304] It follows that if a state court allows third party standing where federal law would not, the state court judgment is not entitled to res judicata effect, since the state court would have erred in creating a federal cause of action where one did not exist. Hence, the determination of third party standing by a state court is always open for federal review, since it presents the issue of whether the litigant has a federal cause of action.

ASARCO dealt with the article III core standing requirement of injury-in-fact. A state court could decide a federal constitutional issue and yet not create a federal cause of action for a person who had no injury-in-fact; that person would receive an advisory opinion, which the state court is free to give if it desires. In contrast, the majority in *Triplett* implies that the question of third party standing is a question of federal substantive law: whether a federal cause of action exists in the litigant. If the state court gives relief to the litigant on the basis of third party rights, the state court is creating a cause of action under federal law, not an advisory opinion. Conversely, if the state court refuses to give relief to the litigant on the basis of third party rights, the court is denying a federal substantive cause of action.

Justice Brennan, in a separate statement, argued that it was not prudent to resolve the reviewability of state court rulings on third-party standing in this case.[305] Justice Brennan noted that a conceptual restructuring of third party standing as a question of federal substantive law would bring some coherence to a confusing area of the law; but that it would also require a change in the law, since the jus tertii doctrine had always been considered a prudential limitation on jurisdiction.[306] Moreover, in *Revere v. Massachusetts General Hospital*,[307] the Court had specifically held that third party standing rules were prudential limitations on federal courts (rather than a grant of a federal cause of action), that were inapplicable to state courts. Given that the attorney met the traditional "relationship" exception to third party standing limitations, Justice Brennan ar-

304. *See id.*
305. *See id.* at 1440-41 (Brennan, J., separate statement).
306. *See id.* at 1440.
307. 463 U.S. 239 (1983).

gued that it was not prudent to decide, without the benefit of briefing or argument, whether the entire doctrine should be restructured.[308]

Implications of Triplett.—*Triplett* shows an increasing recognition, if not an outright holding, that third party standing limitations are substantive and not jurisdictional. In order to grant third party standing, the court must find an implied right of action under federal law.[309] Recharacterizing third party standing in terms of a substantive first party cause of action would bring a needed simplification to this prudential limitation.

The majority's analysis of third party standing in *Triplett* cannot, however, be considered a wholesale restructuring of the doctrine. The reference to third party standing as a question of substantive federal law is in a footnote, and the Court did apply the traditional "relationship" exception to the jus tertii rule in the body of the opinion. Yet it would not be surprising if the question of third party standing is explicitly made a question of federal substantive law in the near future.

F. *The Act of State Doctrine as a Rule of Decision*: W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.[310]

Kirkpatrick obtained a contract with the Nigerian government through the use of bribes, and its competitor brought an action against Kirkpatrick under civil RICO[311] and the Robinson-Patman Anti-Discrimination Act.[312] The district court dismissed on the ground that the act of state doctrine prohibited suit. The court reasoned that to prove its case, plaintiff would have to show that officials of the Nigerian government acted inappropriately in accepting bribes, which was a violation of Nigerian law.[313]

The Third Circuit reversed, finding the act of state doctrine inapplicable, largely on the basis of a memorandum from the Department of State that indicated that no embarrassment to a foreign

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308. *See Triplett*, 110 S. Ct. at 1441 (Brennan, J., separate statement).

309. See the discussion by Judge Bork in Haitian Refugee Center v. Gracey, 809 F.2d 794, 798-809 (D.C. Cir. 1987).

310. 110 S. Ct. 701 (1990).

311. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962-1968 (1988).

312. 15 U.S.C. §§ 13-13b, 21a (1988). Pendent claims under the New Jersey Anti-Racketeering Act were also included. *See* N.J. STAT. ANN. §§ 2C:41-2 (1982).

313. *See* Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., 649 F. Supp. 1381, *rev'd in part*, 847 F.2d 1052 (1988), *aff'd*, 110 S. Ct. 701 (1990).

government and no foreign policy problem would arise from the litigation of the instant case.[314]

The Supreme Court rejected the reasoning of both lower courts, affirming the decision of the Third Circuit that the act of state doctrine was inapplicable, but on different grounds. Justice Scalia, writing for a unanimous Court, held that the act of state doctrine was inapplicable since there was no foreign rule of decision that would have to be declared invalid in order to decide the case.[315]

The Court noted that (like limitations on standing) the act of state doctrine is a rule based on the separation of powers. A court determining the validity of the acts of foreign governments on foreign soil may inhibit the conduct of foreign affairs, which is an area within the competence of the legislative and executive branches.[316]

However, the Court stressed that in contrast to, say, prudential limitations on standing, or the political question doctrine, the act of state doctrine is not a vague rule of abstention. Rather, it is tantamount to a full faith and credit rule for sovereign acts: it establishes a rule of decision that binds both federal and state courts.[317]

Justice Scalia noted that some Justices had in previous cases hinted at the propriety of certain exceptions to the act of state doctrine.[318] Justice White has argued that it should not apply to commercial transactions.[319] Then-Justice Rehnquist has argued for an exception where the executive branch has represented that it has no objection to denying validity to the act of a foreign government.[320]

In *Kirkpatrick*, the Court found it unnecessary to determine whether there were appropriate exceptions to the act of state doctrine. Rather, the act of state doctrine was held simply inapplicable since there was no foreign rule of decision that would have to be invalidated to decide the case. Justice Scalia concluded that the act of state doctrine can only be applicable where the court must de-

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314. *See* 847 F.2d 1051, 1061-62 (3d Cir. 1988).

315. *See Kirkpatrick*, 110 S. Ct. at 707.

316. *Id.* at 704. *See* L. TRIBE, *supra* note 293, at 102-03 (considering act of state doctrine as part of the political question doctrine and the separation of powers).

317. *Kirkpatrick*, 110 S. Ct. at 705.

318. *See id.* at 704.

319. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976).

320. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (plurality opinion). *But see* the opinion of Justice Douglas in the same case ("[t]he Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts out of the fire but not others."). *Id.* at 774 (Douglas, J., concurring).

clare invalid the official act of a foreign sovereign.[321] There was no internal act of the Nigerian government that was alleged to be invalid in this case. In fact, the contract at issue was illegal under Nigerian law. Justice Scalia distinguished the expropriation cases, where upholding a litigant's claims would have required a decision that the act of a foreign government on its own soil was illegal.[322]

Kirkpatrick argued even though the validity of an act of a foreign government was not at issue, the principles behind the act of state doctrine (judicial deference in questions of foreign policy) apply equally to bar any suit where necessary factual findings would be embarrassing to a foreign government. The United States made a similar argument, though contending that the principle of "embarrassment" would not be met on the facts of this case.[323]

Justice Scalia rejected these broader policy arguments on the ground that they would give the act of state doctrine impermissible breadth as well as vague application. The Court squarely held that the act of state doctrine only applies where the court must decide the validity of an internal act, not whenever embarrassing information might be elicited: "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."[324] It is a rule of decision, not an overriding, ad hoc principle of comity.

Justice Scalia emphasized that the act of state doctrine is contrary to the obligation of a court to decide a properly presented case and controversy. To overcome this fundamental policy, there must be a compelling showing that deference is required. That showing exists where the validity of an internal act of a foreign government is at issue, but not whenever any embarrassing information could arise in the course of the litigation.[325]

In *Banco Nacional de Cuba v. Sabbatino*,[326] there is language that suggests a balancing approach to the act of state doctrine: i.e., that the principles behind the doctrine could be weighed with other factors, such as whether the government that committed the act is still in existence; or whether the United States government has or has

321. *See Kirkpatrick*, 110 S. Ct. at 705.
322. *See id.* at 704-05.
323. *See id.* at 706.
324. *Id.* at 707.
325. *Id.* at 706-07.
326. 376 U.S. 398 (1964).

not expressed foreign policy concerns.[327]

Kirkpatrick's attempt to use the balancing approach suggested in *Sabbatino* was soundly rejected by the Court.[328] The Court noted that the balancing approach was mentioned only in the context of balancing *away* the act of state preclusion, not so as to apply the doctrine where it would not otherwise exist. The balancing approach cannot be turned on its head to require the extreme deference mandated by the act of state doctrine if the validity of a foreign act of state is not even in issue.[329]

Implications of Kirkpatrick.—*Kirkpatrick* shows that the Court has limited the application of the act of state doctrine, and in doing so has brought needed clarity and simplification to the rule. The doctrine is not an amalgam of prudential considerations that may vary from case to case to protect foreign governments from embarrassment. Rather, it is a rule of decision, requiring that the court deem valid the act of a foreign government within its own jurisdiction. But it is inapplicable where the validity of an act of a foreign government is not at issue. The case is also indicative of Justice Scalia's preference for clear rules instead of a vague balancing approach that gives rise to unpredictability as well as subjective decisionmaking.[330]

The Court has left open the question of exceptions to the act of state doctrine, while having clearly closed the question of additions. The tone of *Kirkpatrick* expresses a clear preference for courts to decide cases fairly presented to them, and thus a general hostility to the act of state doctrine. It would not be surprising for the following exceptions to be adopted even though the validity of the act of a foreign government is at issue:

1. Where a new foreign government has taken the place of the government that acted originally.
2. Where the case concerns a commercial transaction.
3. Where the executive branch submits that foreign policy will

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327. *See id.* at 421-24. These implications in *Sabbatino* are soundly criticized in Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 338 (1986).

328. *See Kirkpatrick*, 110 S. Ct. at 706-07.

329. *See id.* at 707. Congress, in 1964, acted to limit the act of state doctrine in response to the broad language in *Sabbatino*. The Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) requires adjudication of title claims to property. The amendment has been construed narrowly, however, to cover only American-owned property taken in violation of international law by a foreign government. *See* Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594, 595 n.4 (1986).

330. See the discussion of *Burnham*, *supra* text accompanying notes 197-224.

not be impaired by resolution of the case.[331]

The act of state doctrine does not apply where the subject matter of the action is not within the territory of the foreign government.[332] Nor is it applicable when a transaction by its terms is not governed by the law of the foreign state,[333] or when the entity whose acts are being challenged has not been recognized as the legitimate government of the foreign state.[334] Nor does the act of state doctrine cover acts of a foreign official taken for personal gain, even if the acts are a consequence of the official's exploitation of public authority.[335]

V. PROCEDURE IN CIVIL CASES

Other than *Lujan*, (discussed in Part IV, *supra*), which emphasized strict specificity requirements for nonmoving parties in summary judgment, the Supreme Court decided four cases concerning practice and procedure in the 1989-90 term. Each case concerned a completely different area of procedure. The implications from these cases indicate the broader view of the Justices as to the nature of civil litigation and the role of the trial judge.

A. No Change of Law upon Plaintiff-Initiated Venue Transfer: Ferens v. John Deere Co.[336]

Ferens was injured in Pennsylvania by a Deere product. He brought a timely warranty action in diversity in the federal district court of Pennsylvania, but a tort action was untimely under Pennsylvania law. Ferens brought the tort action against Deere in Mississippi federal district court. Mississippi has a six-year limitations period,[337] which Mississippi state courts apply to any tort action

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331. *See generally* Bazyler, *supra* note 327.

332. *See* Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965) (act of state doctrine inapplicable to act allegedly affecting property outside foreign government's territory).

333. *See* Weston Banking Corp. v. Turkiye Garanti Bankasi, 57 N.Y.2d 315, 456 N.Y.S.2d 684 (1982) (validity of note not controlled by act of state doctrine where parties to note provide that New York law applies to terms and conditions).

334. *See* Linder v. Calero, 747 F. Supp. 1452 (S.D. Fla. 1990) (in tort action against Nicaraguan contras in the death of American citizen, act of state doctrine did not apply because contras were not recognized as legitimate government of Nicaragua; political question doctrine, however, mandated dismissal).

335. *See* United States v. Noriega, 746 F. Supp. 1506, 1523 (S.D. Fla. 1990) (Panamanian dictator's drug-running was not done to further the state interests of Panama, and hence was not covered by the act of state doctrine).

336. 110 S. Ct. 1274 (1990).

337. *See* MISS. CODE ANN. § 15-1-49 (1972).

brought in that state. The Mississippi borrowing statute is not applicable to such actions, even though they arise outside the state.[338] Then Ferens moved to transfer the tort action to Pennsylvania, which was granted under 28 U.S.C. section 1404(a).[339]

The transferee district court applied Pennsylvania law to hold the tort action untimely.[340] The court reasoned that *Van Dusen v. Barrack*,[341] which held that the transferee court must apply the law that the transferor court would apply upon a section 1404(a) transfer, did not apply to plaintiff-initiated transfers under section 1404(a).[342]

The Third Circuit affirmed, but on the ground that application of the Mississippi statute of limitations would violate Deere's right to due process, given the lack of connection between Mississippi and plaintiff's cause of action.[343] The Supreme Court rejected that reasoning in *Sun Oil Co. v. Wortman*,[344] which held that neither the full faith and credit clause nor the due process clause prevents a state from applying its own rules traditionally considered procedural (such as the statute of limitations) to cases brought in the forum.[345] Upon reconsideration after *Wortman*, the Third Circuit agreed with the district court that *Van Dusen* did not apply to plaintiff-initiated transfers under section 1404(a).[346]

When *Ferens* reached the Supreme Court, Justice Kennedy, writing for a five-person majority, held that *Van Dusen* applies to plaintiff-initiated transfers under section 1404(a).[347] Thus, the transferee court must apply the choice of law principles of the transferor forum state.[348] A change of court does not result in a change of law, even though plaintiff initiated the change of court.

The Court reasoned that the *Erie*[349] principles of uniformity,

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338. *See id.* § 15-1-65; Louisiana & Miss. R.R. Transfer Co. v. Long, 159 Miss. 654, 667, 131 So. 84, 88 (1930) (borrowing statute applies only where defendant moves into the state after the cause of action accrues).

339. Section 1404(a) states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988).

340. *Ferens*, 110 S. Ct. at 1278.

341. 376 U.S. 612 (1964).

342. *Ferens*, 110 S. Ct. at 1278.

343. *Id.*; *see* Ferens v. Deere & Co., 819 F.2d 423 (3d Cir. 1987).

344. 486 U.S. 717 (1988).

345. *See id.* at 722.

346. *See* Ferens v. Deere & Co., 862 F.2d 31 (3d Cir. 1988).

347. *See* Ferens v. John Deere Co., 110 S. Ct. 1274, 1277 (1990).

348. *Id.* at 1283-84.

349. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1945).

applied in *Van Dusen* to mandate no change of law upon defendant-initiated transfers, are equally met by mandating no change of law upon plaintiff-initiated transfers.[350] *Van Dusen* emphasized that a plaintiff should not be deprived of state law advantages from the original choice of forum otherwise obtained under *Erie*. If a change in law resulted from a plaintiff-initiated transfer, the plaintiff would indeed be deprived of state law advantages of the originally-chosen forum.

A change in law would mean that because of diversity, plaintiff would be dealt a different result from that which would have been reached in the state court of plaintiff's forum choice.[351] The Mississippi state court would apply the Mississippi statute of limitations, but the Pennsylvania federal court would not. The majority concluded the principles of *Erie* and *Klaxon*[352] would be violated by such disuniformity.[353]

Justice Kennedy stressed that section 1404(a) is designed to retain the *Erie* policy of uniformity and yet diminish the inconvenience arising from plaintiff's initial forum choice. If a change in law were to result from plaintiff-initiated transfer, convenience would come at the expense of *Erie* uniformity. On the other hand, if the plaintiff were forced to remain in the original court in order to obtain favorable law, then *Erie* uniformity would come at the expense of convenience. The majority concluded that the only way to guarantee both uniformity and convenience was to apply the *Van Dusen* no-change-in-law principle to plaintiff-initiated transfers.[354]

The majority contended that applying the "no change of law" rule would not be prejudicial to defendants. If transferee law were applied to defendant's benefit, that would not prevent the suit, it would merely prevent the transfer. The case would go on, inconveniently so, in the original forum of plaintiff's choice. And the inconvenience of plaintiff's chosen forum may well force a defendant to initiate transfer at any rate, in which case transferor choice of law rules admittedly apply.[355]

The Court rejected the defendant's arguments that application of transferor choice of law rules to a plaintiff-initiated transfer

350. *See Ferens*, 110 S. Ct. at 1280.
351. *Id.* at 1281.
352. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
353. *Ferens*, 110 S. Ct. at 1281.
354. *See id.*
355. *See id.*

would result in impermissible forum-shopping by plaintiffs.[356] According to the majority, the application of transferor law does not give rise to any forum-shopping that does not already exist without regard to section 1404(a). Plaintiff's initial choice of forum may result from shopping, but all *Van Dusen* prevents is the use of a section 1404(a) transfer as a forum-shopping device.[357] This argument is not entirely persuasive, because if transferee law would apply to plaintiff-initiated transfers, plaintiff would have no reason to shop for an extremely inconvenient forum with favorable law; plaintiffs such as Ferens may never bring suit in Mississippi if they know that they will actually have to litigate there to get the benefit of favorable forum law.

Justice Kennedy also contended that the application of transferor choice of law rules furthers important considerations of efficiency and convenience.[358] It avoids difficult issues of an elaborate survey of transferee laws and their differences, which would be necessary to determine whether a change of law to the prejudice of plaintiff would be inconsistent with the interests of justice. It also allows transfer for convenience where otherwise plaintiff might choose to remain in an inconvenient forum with favorable law.[359] And it avoids difficult issues such as which law applies for *sua sponte* transfers, what happens if both parties move for transfer, etc. A unitary rule provides clarity.

If a plaintiff can just pick up a favorable law and run to where the suit ought to have been brought in the first place, one might ask why it is necessary to jump through the procedural hoop of filing in the favorable law forum. Why not just deem it to have been done? The majority rejected this efficiency argument, and held that even though the plaintiff can "stop, shop and go," it was still necessary to make a stop in the favorable law forum.[360]

The Court explained that a section 1404(a) transfer is not automatic. Justice Kennedy also stated rather vaguely that under the "interest of justice" factor of section 1404(a), transfer may be less likely to be granted if it was the plaintiff and not defendant who initiated the transfer.[361]

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356. *See id.* at 1281-82.

357. *See id.* at 1282.

358. *Id.* at 1282-83.

359. This argument is somewhat inconsistent with the Court's prior contention that most of the time the defendant will move to transfer from an inconvenient forum anyway.

360. *See Ferens*, 110 S. Ct. at 1284.

361. *See id.*

Yet it is hard to see in what way the initiation by plaintiffs, instead of defendant, can be pertinent to limiting transfer in the interest of justice, given the Court's reliance on section 1404(a) as providing convenience together with state law forum-shopping. The whole thrust of the majority opinion in *Ferens* is that it is not unjust for the plaintiff to shop for favorable law and then to obtain convenience through transfer. It seems implausible that the Court left the "interest of justice" factor open as a back door to penalize a plaintiff for forum-shopping in an inconvenient forum, by imprisoning him in his favorable law forum. That would be guaranteeing uniformity at the expense of convenience, contrary to the principles that the majority found compelling in section 1404(a). The apparent meaninglessness of the Court's dictum on interest of justice is noted by Justice Scalia in dissent.[362]

Nonetheless, the dictum on interest of justice can be used by lower courts to deny plaintiff-initiated transfers, even though the transferee forum is more convenient: the majority invited lower courts to do this despite all the contrary reasoning in the majority opinion. The parameters of the interest of justice exception to plaintiff-initiated transfer remain to be developed.[363]

Justice Scalia, joined by Justices Brennan, Marshall, and Blackmun, dissented. Justice Scalia argued that section 1404(a) was not intended as a vehicle by which plaintiff could appropriate a law from a forum in which he has no intent to litigate, and then carry the prize back to the intended forum. That is no different from the defendant forum-shopping-by-transfer which was prohibited in *Van Dusen*.[364]

The dissent contended that in terms of real-life litigation, the majority's holding violated the uniformity principles of *Erie*: the majority provides for a different result in Pennsylvania federal court than would have been reached in Pennsylvania state courts. The dissenters reasoned that the relevant *Erie*-referent in *Ferens* is Pennsylvania, since that is where the plaintiff always intended to bring the tort claim. Looking at uniformity of result from the Mississippi court's point of view (as if plaintiff ever really intended to litigate

362. *See id.* at 1288 (Scalia, J., dissenting).

363. *See* Frazier v. Commercial Credit Equip. Corp., 755 F. Supp. 163 (S.D. Miss. 1991) (plaintiff-initiated transfer to West Virginia, after picking up six-year statute of limitations, was denied in the interests of justice where forum court had already expended considerable resources on consideration and management of the case and transfer would result in decreased chance of prompt resolution).

364. *See Ferens*, 110 S. Ct. at 1286 (Scalia, J., dissenting).

there) is misplaced, since plaintiff was only using the favorable law forum as a way station all along. It was never a meaningful forum choice that *Erie* was designed to protect by mandating uniformity.[365]

Justice Scalia further contended that the majority erred in their fear that the threat of transferee law would result in litigation remaining in inconvenient favorable law forums. The majority presumed that if the law changed upon plaintiff-initiated transfer, then transfer would almost always be denied because the court will be concerned about prejudice to the plaintiff—i.e., that an unfavorable law would be applied after transfer. Justice Scalia responded that where transfer is plaintiff-initiated, prejudice to the plaintiff is properly considered irrelevant.[366] Whatever prejudice plaintiff would suffer would be brought on by his own motion. This is true, but it presumes that plaintiffs would ever make a motion to transfer from an inconvenient favorable law forum if a change of law would result. That seems unlikely. Thus, the majority opinion is fundamentally correct in asserting that some cases would remain in inconvenient forums if a change of law would result.

Implications of Ferens.—*Ferens* indicates adherence to the federalism principles behind the *Erie* doctrine, even to the point of an arguably unjust and certainly comical result.

After *Ferens*, plaintiffs in diversity can go to any state to pick up any favorable law that the forum state would apply, and carry it out with them upon transfer. This may be a "procedural" law such as the statute of limitations, as well as any substantive law that is more favorable than the law that would otherwise be applied by the ultimate destination forum.

With respect to the statute of limitations and other traditionally procedural laws—held to be procedural under *Sun Oil v. Wortman*, and yet substantive under *Erie* so that they apply in diversity[367]—the only limitation on the ability of plaintiffs to shop and yet transfer for convenience is the ambiguous, and probably meaningless, reference to the interests of justice in the *Ferens* majority opinion.

As to laws considered substantive for both choice of law and *Erie* purposes, a plaintiff can shop for these and carry them to the more convenient forum as well. Constitutional limitations on the application of forum law will, however, provide some limitations on

365. *Id.*

366. *Id.*

367. *See supra* note 345 and accompanying text; Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (limitations periods are substantive for *Erie* purposes).

the substantive law that the transferor forum could apply.[368] Constitutional limitations on choice of law obviously apply to section 1404(a) transfers: if the original forum state could not constitutionally apply its law, it makes no sense and is in fact contrary to *Van Dusen* for the transferee court to apply transferor law—unlike laws traditionally considered procedural, which are free from constitutional purview after *Sun Oil v. Wortman*.[369] A footnote in *Van Dusen* recognizes that constitutional limitations on choice of law may prevent application of the substantive law of the transferor forum.[370]

When *Ferens* is combined with *Burnham*, discussed in Part III, *supra*, it is apparent that plaintiffs may have strategic advantages in certain cases. If the plaintiff is lucky enough to serve the defendant in a state with law favorable to the plaintiff, the plaintiff can then transfer and carry that favorable law with her. This can occur even though neither party has any connection to the forum state other than defendant's transitory presence there.

B. *Mandatory Notice in Citizen Suit Provisions:* Hallstrom v. Tillamook County[371]

Many of the congressional acts concerning protection of the environment contain a citizen suit provision, permitting citizens to enforce regulations promulgated under the respective act.[372] Most of these citizen suit provisions contain a sixty-day notice requirement,[373] under which the citizen, at least sixty days before bringing the action, must notify the alleged violator, the state, and the Environmental Protection Agency of the citizen's intent to sue.[374]

The citizen in *Hallstrom* did not comply with the sixty-day notice provision before bringing suit. But the district court held that the notice requirement was not a mandatory precondition to suit, so long as the parties to be notified were given sixty days to cure any

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368. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (forum state could not constitutionally apply substantive law to causes of action having no connection to the forum).

369. *See, e.g.*, Ferens v. John Deere & Co., 819 F.2d 423, 426 (3d Cir. 1987) ("*Klaxon* and *Barrack* require a federal diversity forum to apply [only such] . . . state choice-of-law rule[s] which the state court could, as a matter of federal law, lawfully apply.").

370. *See* Van Dusen v. Barrack, 376 U.S. 612, 639 n.41 (1964).

371. 110 S. Ct. 304 (1989).

372. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1988); Clean Air Amendments, 42 U.S.C. § 7604 (1988).

373. *See* 110 S. Ct. at 307 n.1, for a list of many statutes with a notice requirement for citizen suits.

374. *See id.* at 307.

alleged violation before the litigation would proceed.[375] In the district court's view, a sixty-day stay after commencement of the litigation would be the functional equivalent of sixty days' notice before its commencement. The case proceeded to trial and resulted in a judgment for the citizen-plaintiff. The Ninth Circuit held that the action should have been dismissed because compliance with the statutory notice provision was a jurisdictional requirement.[376]

Justice O'Connor, writing for seven members of the Court, held that the sixty-day notice provision for citizen suits was a mandatory precondition to suit.[377] The majority found that the plain language of the statute required this draconian result. The particular statute at issue, 42 U.S.C. section 6972, states that a citizen suit under the Resource Conservation and Recovery Act may not be "commenced . . . prior to sixty days after the plaintiff has given notice . . . ."[378] Applying the plain meaning rule, Justice O'Connor found that a literal reading of this language indicates that the notice requirement is mandatory, not optional.[379]

The Court rejected the citizen's claim that the intent of the statute could be equally met by staying the action and giving the parties to be notified sixty days to correct the alleged problem. The Court stated that the use of the stay alternative, while perhaps a functional equivalent, was not permitted by the plain terms of the statute, which says that the suit may not "commence" before notice is given.[380]

The Court also rejected the citizen's argument that a strict construction of the notice requirement would be contrary to congressional intent. Under the plain meaning rule, the words of a statute, if clearly expressed, are conclusive.[381] At any rate, the Court found that strict enforcement of the notice requirement comports with congressional intent, which was to strike a balance between encouraging citizen enforcement and avoiding burdensome litigation in

375. *See id.* at 307-08.

376. Hallstrom v. Tillamook County, 844 F.2d 598, 601 (9th Cir. 1987), *aff'd*, 110 S. Ct. 304 (1989).

377. *See Hallstrom*, 110 S. Ct. at 312.

378. *Id.* at 309.

379. *See id.* at 308-09.

380. *See id.* at 309.

381. *See id.* at 310. In rare cases, the Court will contravene the plain meaning of a statute if a literal application would produce a result "demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). But the Court found this to be not such a rare case; the majority's result was in fact consonant with the intent of the drafters, to strictly enforce the notice requirement. *Hallstrom*, 110 S. Ct. at 310.

the federal courts.[382]

Finally, the Court held that dismissal was mandated even though the litigation had actually resulted in a judgment on the merits. The Court phrased the question in terms of retroactivity, and found none of the factors pointing toward nonretroactivity in civil cases to be applicable.[383]

Underlying the majority's apparently unsympathetic analysis is the feeling that the plaintiff made an unforced error— plaintiff's counsel, solely through inadvertence, failed to comply with a specific notice requirement. Given the plain language of the statute, the Court was not about to relieve the litigant from the consequences of errors of his own making.

The Court distinguished a title VII case in which it had eschewed a technical reading of procedural requirements[384] as one in which it was necessary to protect unsuspecting laypersons from procedural traps. In contrast, the *Hallstrom* Court assumed that citizen suits under environmental statutes are brought with assistance of sophisticated counsel.[385]

Justice Marshall, joined by Justice Brennan, dissented. The dissenters argued that while the statutory language requiring notice may have been clear, the remedy chosen by the Court— mandatory dismissal—was not specified by the statute and hence was not within the plain meaning rule. Justice Marshall argued that in the absence of specific language to the contrary, a sixty-day stay would equally satisfy the mandatory notice requirement.[386]

Implications of Hallstrom.—*Hallstrom* is another example of the Court's renewed invigoration of the plain meaning rule.[387] If the statutory language is clear (and of course there is often a dispute about the clarity of such language), it is the rarest of rare cases that will come to a result different from that apparently mandated by the language.[388]

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382. *See Hallstrom*, 110 S. Ct. at 310.

383. *See id.* at 312; *see* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for a discussion of those factors.

384. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) (construing the timely filing requirement of title VII to be subject to waiver, estoppel, and equitable tolling).

385. *See Hallstrom*, 110 S. Ct. at 310.

386. *Id.* at 313-15 (Marshall, J., dissenting).

387. For other examples of the Court's renewed interest in the plain meaning rule, see Northbrook Nat'l Ins. Co. v. Brewer, 110 S. Ct. 297 (1990) and Tafflin v. Levitt, 110 S. Ct. 792 (1990), discussed *supra* at text accompanying notes 162-185.

388. For a recent example of the Court rejecting the plain meaning of a statute on the

The Court in *Hallstrom* and *Lujan*[389] shows that it is interested in strict enforcement of procedural rules where noncompliance resulted solely from inadvertence of counsel. The rule that the sixty-day notice requirement is mandatory is intended to apply not only to the citizen suit provision before the Court in *Hallstrom*, but also to all notice provisions modeled after section 304 of the Clean Air Amendments of 1970.[390] The Court, in a footnote, cites eighteen other citizen suit provisions controlled by its decision.[391] The Court also noted, however, that Congress has chosen to dispense with the sixty-day notice requirement and allow an immediate citizen suit in certain emergency situations.[392]

The Court in *Hallstrom* did not decide whether the sixty-day notice provision is a requirement of subject matter jurisdiction. If so, the provision would of course not be waivable. The Court did not have to decide this issue (though the Ninth Circuit had found the notice provision jurisdictional) since the defendant in fact asserted an objection.

C. *District Court Discretion to Facilitate Notice to Class Action Plaintiffs Under the Age Discrimination in Employment Act*: Hoffman-La Roche Inc. v. Sperling[393]

Employees who claimed they were the victims of age discrimination formed an employee group and filed a class action under the Age Discrimination in Employment Act of 1967 (ADEA).[394] The group mailed a letter to about 600 employees whom it had identified as potential members of the class. Under the ADEA, plaintiffs must "opt in" to class litigation, in contrast with ordinary federal class action procedure in which class plaintiffs become parties unless they opt out.[395]

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ground that it would lead to an absurd result, see Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (construing "to the defendant" language of former Federal Rule of Evidence 609(a)(1) to apply only to criminal defendants).

389. *See supra* notes 226-248 and accompanying text, where the Court in *Lujan v. National Wildlife Federation* refused to consider untimely affidavits on the ground that plaintiffs should not have assumed the strength of their claims until it was too late.

390. *See Hallstrom*, 110 S. Ct. at 307.

391. *See id.* at 307 n.1.

392. *See id.* at 311. *See, e.g.*, 33 U.S.C. § 1365(b) (1988) (citizen suits may be brought immediately in cases involving violations of toxic pollutant effluent limitations).

393. 110 S. Ct. 482 (1989).

394. 29 U.S.C. §§ 621-634 (1988).

395. *Compare* rule 23(b)(3) of the Federal Rules of Civil Procedure (class action binding unless member decides to opt out) *with* 29 U.S.C. § 216(b) (1988) (ADEA representative actions not binding unless member decides to opt in).

Over 400 of the 600 on the target list returned signed consents. To ensure that all potential plaintiffs would receive notice, plaintiffs then moved for discovery of the names and addresses of all similarly situated employees. They also asked the district court to send notice to all potential plaintiffs who had not filed consents. The district court ordered the requested discovery, and also authorized the employees to send a notice and a consent document with language and form approved by the court. The approved notice stated that it had been authorized by the district court, but that the court was taking no position on the merits of the case. The question for the Supreme Court was whether a district court has discretion to regulate and facilitate notice in an ADEA class action.[396]

Justice Kennedy wrote the opinion for a seven-person majority. The Court, framing its ruling narrowly, held that a district court is not prohibited from playing some role in authorizing the terms and conditions of communications from the named plaintiffs to the potential members of an ADEA collective action. The Court stated that "[w]e confirm the existence of the trial court's discretion, not the details of its exercise."[397]

The Court further held that the discovery order was permissible because the information sought was relevant to the subject matter of the action. As to the discovery order, the Court took a very broad view of relevance, as Justice Scalia pointed out in dissent. The information sought was the names of similarly situated employees. While these people could have had knowledge of relevant facts, the Court found it unnecessary to decide that question and held that the names themselves were discoverable because they were relevant.[398] But the plaintiffs sought the names not to obtain relevant information but rather to round up parties who would join with them in the action. The information was not sought to lead to the discovery of admissible evidence, as is required by federal rule 26 (b). But the majority gave this question little attention.

The Court further found that the district court was within its discretion in regulating and facilitating the notice procedure. Justice Kennedy emphasized several advantages of trial court oversight of pretrial notice:

1. The court can by exercising "managerial responsibility"

396. *See Hoffman-LaRoche*, 110 S. Ct. at 485-86.

397. *Id.* at 485.

398. *See id.* at 486.

control potentially misleading communications to possible class members.

2. Early judicial intervention is often necessary for efficient management of large-scale litigation. The trial judge can thereby see the contours of an action at the outset. Early management can also avoid after-the-fact contests about improperly obtained consents.

3. Court intervention is likely to lead to more notified claimants than can be reached through individual efforts. This in turn reduces the possibility of a multiplicity of later suits by claimants who were never notified of the prior action.[399]

Justice Kennedy stressed that while the district court has the authority to control pre-trial notice procedures, the court must be careful to avoid any appearance of endorsement of the merits of the action. In the instant case, there was a specific disclaimer on this point in the court-ordered notice.

Justice Scalia, joined by Chief Justice Rehnquist, wrote a vigorous dissent. The dissenters objected to the Court's downplaying this case as one involving mere case management. According to Justice Scalia, the district court exercised unprecedented and unauthorized power in bringing people who were not parties into the litigation. In Justice Scalia's language, the district court was guilty of "midwifing" the action.[400]

Justice Scalia found it unprecedented, if not unconstitutional, for a district court purportedly to manage a party's case where the party was not yet before the court. Justice Scalia distinguished judicial control of notice procedures in class actions under rule 23: in such actions, the class plaintiffs are considered parties to the litigation from the outset, whereas in ADEA actions they must affirmatively opt in before they are considered part of the action.[401]

The dissent admitted that trial court participation in the ADEA notice process would reduce the risk of duplicative litigation, but contended that this is a "justification in policy but not in law."[402] Indeed, if dispositive weight is given to efficiency of litigation, it would seem that courts could notify any nonparty in any situation that they ought to join in a related litigation to conserve personal and judicial resources. There is no reason to stop at an ADEA ac-

399. *Id.* at 487.
400. *See id.* at 489 (Scalia, J., dissenting).
401. *See id.* at 490.
402. *Id.* at 491.

tion. Certainly, giving efficiency dispositive weight would mean that the Court's cases on pendent party jurisdiction have been wrongly decided.[403]

Justice Scalia closed with a lament against the case managing judicial bureaucracy, which, in his view, is often used to stir up litigation. He contended that the trial court's traditionally passive role is a natural outgrowth of an adversarial as opposed to inquisitorial system, and should not be disregarded merely because another judicial model would be more efficient.[404]

Implications of Hoffman-LaRoche.—*Hoffman-LaRoche* indicates that Court input into notice is not limited to ADEA actions, but is at least implicitly authorized for any representative action. The Court specifically approved a case that allowed court input into notice in an action under the Fair Labor Standards Act.[405] The case indicates more broadly that the Court looks favorably toward case managing tactics in complex cases. While *Hoffman-LaRoche* is limited to notice procedures, the Court speaks more broadly about the benefits of active case management in general, and cites general articles on the subject.[406] To some extent, allowing case management is inconsistent with the general thrust of other decisions in the term—control on judicial authority and activism. It is significant, however, that *Hoffman-LaRoche*, unlike *Spallone*, is not a case in which federalism problems are a concern; and the Court may recognize that where federalism is not a concern, pragmatism and efficiency may sometimes outweigh the need to control judicial authority.

D. *Post-judgment Interest, and Intervening Changes of Law on Appeal*: Kaiser Aluminum & Chemical Corp. v. Bonjorno[407]

Bonjorno brought suit against Kaiser and obtained a verdict in his favor. The district court found this judgment not supported by the evidence, and ordered a retrial on the issue of damages. The

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403. *See, e.g.*, Finley v. United States, 109 S. Ct. 2003 (1989) (no pendent party jurisdiction over state claim even though related federal claim can only be brought in federal court). The result in *Finley* has recently been legislatively overruled, at least in federal question cases, by the Judicial Improvements Act of 1990. *See* 28 U.S.C. § 1367(c) (1990).

404. *See Hoffman-LaRoche*, 110 S. Ct. at 492 (Scalia, J., dissenting).

405. *See id.* at 484 n.1, 486-87; Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335 (2d Cir. 1978).

406. *See, e.g.*, Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

407. 110 S. Ct. 1570 (1990).

trial court's determination was not appealed by either party. On the retrial as to damages Bonjorno obtained a substantial judgment. The trial judge granted partial judgment notwithstanding the verdict as to a portion of the damages awarded by the jury. Bonjorno appealed, and the Third Circuit reversed the partial judgment n.o.v. and reinstated the substantial judgment won by Bonjorno.[408]

While the appeal was pending the post-judgment interest statute, 28 U.S.C. section 1961, was amended to provide for a rate of interest determined by Treasury Bill rates at the time of judgment.[409] The statute in effect on the date of the Bonjorno judgment had set post-judgment interest rates by reference to state law (which was significantly lower than the post-amendment rate).

The questions for the Supreme Court were: whether interest should be calculated from the date of the judgment or from the date of the verdict; whether interest could be calculated from the date of the original judgment in Bonjorno's favor which had been held legally insufficient by the trial court, and which was not appealed; and whether the rate of post-judgment interest was governed by the law at the time the judgment was entered or by the amendment that was passed while the case was on appeal.

Justice O'Connor wrote the opinion for a five-person majority. The Court held:

1. That post-judgment interest must be calculated from the date of judgment, not from the date of verdict. All members of the Court agreed with this holding.[410]

2. That interest cannot be calculated from the date of a judgment held legally insufficient. All members of the Court agreed with this holding.[411]

3. That the rate of interest was governed by the statute as it existed on the date the judgment was entered. It was on this issue that there was significant dispute.[412]

The Court found that calculation from the date of judgment rather than verdict was required by the plain terms of the post-judgment interest statute. Both the original and the amended version of the statute refer specifically to the date of judgment as the reference

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408. 752 F.2d 802 (3d Cir. 1984). Kaiser's petition for certiorari was denied. 477 U.S. 908 (1986).

409. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, § 302 (1982).

410. *See Bonjorno*, 110 S. Ct. at 1576; *id.* at 1594 (White, J., dissenting).

411. *See id.*

412. *See id.* at 1578; *id.* at 1594 (White, J., dissenting).

point, and neither refers at all to the date of verdict.[413] The Court recognized that calculation from the date of judgment may be unfair to plaintiffs who, despite having won, will bear the burden of the loss of the use of money to which they are entitled during the period between verdict and judgment. But this possible unfairness was not sufficient to overcome the plain language of the statute, and the accepted notion that the allocation of litigation costs is a question for the legislature, not the courts.[414]

The Court reasoned that calculation of interest from the date of a legally insufficient judgment would be inconsistent with the intent of the post-judgment interest statute. The statute was designed to compensate the plaintiff for loss of use of money as to which there is an adjudicated entitlement. There has been no adjudicated entitlement where the judgment as to damages is held by the trial court not to have been supported by the evidence, and no appeal from that ruling is taken. Consequently, interest cannot be calculated from the date of such a judgment.[415]

As to the appropriate interest rate, the Court framed the issue as whether the amended 28 U.S.C. section 1961 should be given retroactive effect. Justice O'Connor noted a tension in the Court's precedents concerning retroactive application of statutes. On the one hand, in a line of cases proceeding from *Thorpe v. Durham Housing Authority*,[416] the Court has stated that with respect to changes in law occurring after a suit is brought, a court is to apply a statute as it exists at the time it renders its decision, unless such retroactive application would result in manifest injustice or is clearly contrary to congressional intent. Thus, for changes of law that occur after litigation has begun, there is a presumption of retroactivity.

On the other hand, in a line of cases including *Bowen v. Georgetown University Hospital*,[417] the Court has held that with respect to post-conduct, pre-litigation changes in statutes, there is a presumption in favor of prospective application, since retroactivity is

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413. Both the original statute and the amended version state that "interest shall be calculated from the date of the entry of the judgment." 28 U.S.C. § 1981 (1976 & Supp. 1982); *see also* Comment, *Post-Judgment Interest in Federal Courts*, 37 EMORY L.J. 495 (1988) (date of judgment provides uniform reference point for all post-judgment issues).

414. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (liability for attorney's fees is a question for the legislature). *But see* Chambers v. Nasco, 111 S. Ct. 2123 (1991) (federal court has inherent power to award attorney's fees as a sanction for litigation abuse, whether or not statutes are applicable).

415. *See Bonjorno*, 110 S. Ct. at 1578.

416. 393 U.S. 268 (1969). *See also* Bradley v. Richmond School Bd., 416 U.S. 696 (1974) (retroactive effect of legislation is presumed).

417. 488 U.S. 204 (1988).

not favored in the law. This presumption (like the contrary *Thorpe* presumption of retroactivity) can be overcome by a clear legislative statement to the contrary.[418]

Justice O'Connor did not find a need to reconcile these two apparently inconsistent lines of precedent. She reasoned that under either view, a clear congressional intent is controlling, and she found clear congressional intent that the amended section 1961 should not apply retroactively to judgments rendered before the effective date of the amendment.[419]

Justice O'Connor reasoned that each version of section 1961 refers to a single rate of interest, and uses as a reference point the date of the judgment. Thus, a fair reading of both versions is that on the date of the judgment, a single interest rate is set once and for all. Since the interest rate at the time of Bonjorno's judgment was set for all time at the state law rate, Justice O'Connor reasoned that Congress did not intend that the rate would be changed by intervening legislation.[420]

In an extensive concurring opinion, Justice Scalia attacked the *Thorpe* line of "presumed retroactivity of statutory law to pending cases" as unsound. Justice Scalia proposed as a general rule in all cases that a statute be deemed to have only prospective effect unless the legislature indicates to the contrary.[421] That is, he argued that the *Thorpe* line of authority should be explicitly rejected in favor of the *Georgetown Hospital* line of authority.

Justice Scalia argued that the co-existence of the two lines of precedent could not be reconciled.[422] It is true that *Thorpe's* retroactivity rule applies to statutory changes made after a suit is initiated, and *Georgetown Hospital's* prospectivity rule applies to statutory changes made after the conduct, but before a suit is initiated. Yet any distinction based upon the date which suit is brought is irrational.[423] It would mean that a statute abrogating or imposing liability would apply to litigants who had brought their case the day before a statute became effective, but not to litigants who brought their case the day after.

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418. *See also* United States v. Marengo County Comm'n, 731 F.2d 1546, 1553 (11th Cir. 1984) (applying the presumption that statutes are not to be given retroactive effect unless there is a clear legislative intent to do so).

419. *See Bonjorno*, 110 S. Ct. at 1577-78.

420. *See id.* at 1578.

421. *See id.* at 1579 (Scalia, J., concurring).

422. *Id.*

423. *Id.* at 1586.

Justice Scalia argued that the cases such as *Thorpe* establishing a presumption of retroactivity for pending cases had for the most part unnecessarily decided this issue.[424] He contended that most of these cases dealt with situations in which retroactive application of law has been consistently applied without objection:

1. Retroactivity of intervening case law, as opposed to intervening statutes, is well-accepted. Intervening case law has always carried a presumption of retroactivity since under the common-law system a judicial decision is regarded as a statement of pre-existing law.[425]

2. Application of intervening law to claims for injunctive relief is also well-accepted. Obviously, future relief cannot be granted on the basis of prior law that has been changed. Applying the new law to future relief is prospective, not retroactive application.[426]

3. Where punishments have been repealed, a presumption of retroactivity has been traditionally applied.[427]

4. Where there is congressional indication of retroactivity, even the *Georgetown* line of cases would mandate retroactive application.

Justice Scalia argued that since a choice must be made between the conflicting lines of cases as to retroactivity of statutory law, it was clear that the presumption of retroactivity should be scuttled in favor of a presumption of prospective application of statutes. Justice Scalia contended that retroactivity is not favored in the law. He found it unfair to determine legal rights and liabilities by standards that the parties could not have known about or complied with at the time of their conduct.[428]

Justice Scalia further contended that a presumption of retroactivity was inconsistent with how the legislature would be expected to operate. According to him, a presumption of retroactivity is "contrary to fundamental notions of justice, and thus contrary to realistic

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424. *See id.* at 1583.

425. *Id.* at 1583-84. *See, e.g.*, Gonzalez v. Home Ins. Co., 909 F.2d 716, 723 (2d Cir. 1990) (applying intervening Supreme Court case law announced in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), to pending case).

426. *Bonjorno*, 110 S. Ct. at 1584-85.

427. *Id.* at 1585. *Cf.* United States v. Havener, 905 F.2d 3, 5-6 (1st Cir. 1990) (ex post facto clause forbids the application of any law or rule that increases punishment to pre-existing criminal conduct; 1 U.S.C. § 109 overcomes common-law presumption of retroactivity of statute decreasing or abolishing punishment by providing that new statutes that decrease punishment normally do not affect pending prosecutions).

428. *See Bonjorno*, 110 S. Ct. at 1586.

assessment of legislative intent."[429]

Finally, Justice Scalia attacked the vagueness of the "manifest injustice" exception to the *Thorpe* presumption of retroactivity rule. He concluded that the injustice exception is just a vehicle for subjective policy-making. Indeed, that would have to be the case, since an exception for injustice to a rule that is itself unjust is an anomaly that cannot be fairly applied.[430]

Justice White, joined by Justices Brennan, Marshall, and Blackmun, dissented as to the appropriate rate of interest to be applied.[431] Justice White contended that the case did not present a true retroactivity issue. In Justice White's view, the obligation to pay post-judgment interest is a continuing and recurring one.[432] It is obvious that a change in law applies prospectively to new obligations as they accrue. Essentially, Justice White and Justice O'Connor differ as to whether post-judgment interest is a single obligation or a constantly recurring one as it goes unpaid.

Implications of Bonjorno.—Most members of the Court appear inclined to revisit the tension between the *Thorpe* presumption of retroactivity and the *Georgetown* presumption of prospectivity. Justice Scalia has clearly expressed his view that a presumption of retroactivity should be rejected. The dissenters in *Bonjorno* appear favorably inclined to retain a presumption of retroactivity; Justice White argued that true retroactive application only occurs where there is a change of law that overturns an adjudication of rights that has already become final. For her part, Justice O'Connor implies that *Thorpe* may have misread prior precedent.[433] So while it is conjectural, it would appear that there is a majority of the Court who may be willing to abolish the presumption of retroactivity for intervening statutes in pending cases. Certainly it behooves the Court to clarify and simplify the mixed signals that it has given in this important area.[434]

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429. *Id.*

430. *Id.* at 1587.

431. *Id.* at 1588 (White, J., dissenting).

432. *See id.* at 1588-91.

433. *See id.* at 1576. *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 108 (1801) (where the Court mandated retroactive application if Congress clearly intended it). According to Justice O'Connor, *Thorpe* "broadened" the rule in *Schooner Peggy* to mandate retroactive application unless Congress clearly intended to the contrary. Of course, this is not just a "broadening," but a complete recharacterization.

434. *See* McKnight v. General Motors Corp., 908 F.2d 104, 110 (7th Cir. 1990) (while judicial decisions are ordinarily applied retroactively to pending cases, "[t]he picture with regard to statutes is decidedly mixed").

Justice White notes several open questions concerning the appropriate date from which post-judgment interest should run when a judgment is altered by incorrect rulings of the trial court.[435]

1. What is the proper commencement date for post-judgment interest where a new trial is ordered, or judgment n.o.v. granted, but the plaintiff successfully appeals the order? Most lower courts have found the proper date to be that on which the erroneous judgment was entered.[436] Some lower court authority measures post-judgment interest in such situations from the date of the verdict.[437] But this view is suspect after the Court's general rejection of the date of verdict as a reference point in *Bonjorno*.

2. What is the proper commencement date when the district court correctly ascertains total damages but improperly apportions them among the parties? Lower courts have reasoned that interest should be measured from the date of the initial judgment, since a finding of misapportionment as the only error means that the judgment is substantially affirmed on appeal; and certainly from plaintiff's view, there has been an adjudicated entitlement to a lump sum from the date of the judgment.[438]

3. What is the proper commencement date where a judgment is entered after a second trial that did not include interest accrued after the first judgment? Lower courts have held that where the second judgment does not include as damages the interest accrued from the date of the first judgment, then post-judgment interest should run from the date of the first judgment.[439]

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435. *See Bonjorno*, 110 S. Ct. at 1594 (White, J., dissenting).

436. *See* Woods Exploration & Producing Co. v. Aluminum Co. of America, 509 F.2d 784, 789 (5th Cir. 1975) (when judgment n.o.v. is reversed on appeal, post-judgment interest is to be calculated from the date the erroneous judgment was entered).

437. *See, e.g.*, Turner v. Japan Lines, Inc., 702 F.2d 752, 754 (9th Cir. 1983) (successful appeal of judgment n.o.v. results in post-judgment interest computed from date of verdict).

438. *See, e.g.*, Brooks v. United States, 757 F.2d 734, 741 (5th Cir. 1985) (where misapportionment is the only error found on appeal, the judgment is substantially affirmed and the case is to be treated for interest purposes from the date of the initial judgment). *Cf.* Premier Corp. v. Serrano, 471 F. Supp. 444, 446 (S.D. Fla. 1979) (judgment for attorney's fees later modified; interest on revised award runs from the date of the original judgment).

439. *See, e.g.*, Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1300 (9th Cir. 1984) (where the second judgment includes as damages interest from the date of, and on the amount of the first judgment, post-judgment interest is not available from the date of the first judgment since that amount has already been included as damages; where it has not been so included, post-judgment interest runs from the date of the original judgment; latter rule applied in this case where there is no evidence in the record of the second trial to support the jury's consideration of the time value of money between the first and second judgments).

4. What is the proper date of reference where an award is reduced on appeal and a new judgment is entered upon remand? The lower courts have split on whether interest should run from the date of the first judgment, because that is the date on which the correct judgment should have been entered, or whether interest should run from the date of entry of the revised judgment since it is only at that point that there is a final adjudication.[440]

VI. JURY TRIAL

In the 1989-90 term, the Supreme Court decided two cases concerning the seventh amendment right to jury trial. Both cases reaffirm the Court's strong commitment to protecting the traditional right to jury trial.

A. Jury Trial for Claims Against a Union for Breach of the Duty of Fair Representation: Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry[441]

Union members filed a grievance with the union concerning the employer's alleged unfair labor practice in depriving the members of proper seniority status. The union refused to process the grievance. The members brought an action against the union for a breach of the duty of fair representation. The members demanded compensatory damages for lost wages and health benefits, and requested a jury trial. The lower courts held that the seventh amendment guarantees a jury trial for such claims.[442]

Justice Marshall, writing for four members of the Court as to all points, and joined by Justices Stevens and Brennan as to controlling points so as to constitute a majority opinion, held that the seventh amendment guarantees the right to jury trial for money damage claims against a union for violation of the duty of fair representation.[443]

The Court employed its traditional two-pronged approach to

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440. *See* Perkins v. Standard Oil Co., 487 F.2d 672, 676 (9th Cir. 1973) (interest runs from date of original judgment, because that is the date on which the correct judgment should have been entered); *contra* Harris v. Chicago Great W. Ry., 197 F.2d 829, 836 (7th Cir. 1952) (interest runs from date of entry of revised judgment since there is a final valid judgment only when a new one is entered in accord with appellate court's mandate). *See generally* Comment, *Interest on Judgments in the Federal Courts*, 64 YALE L.J. 1019 (1955).

441. 110 S. Ct. 1339 (1990).

442. Terry v. Chauffeurs, Teamsters and Helpers, Local 391, 676 F. Supp. 659 (M.D.N.C. 1987), *aff'd*, 863 F.2d 334 (4th Cir. 1988).

443. *See Terry*, 110 S. Ct. at 1349.

determine whether a jury trial right in statutory actions is guaranteed: first, the Court compares the statutory action to eighteenth century actions brought in England prior to the merger of law and equity, and determines the type of action with which plaintiff's claim is most comparable. Second, the Court examines the remedy sought and determines whether it is legal or equitable in nature.[444]

Applying the first prong of historical comparison, Justice Marshall, writing for only four Justices on this point, found that an action for breach of the duty of fair representation was equally comparable to two English causes of action, one equitable and one legal.

Justice Marshall found an analogy to the equitable action by a beneficiary against a trustee for breach of fiduciary duty. Like a trust, a union member lacks direct control over union actions taken on his behalf, including the handling of grievances. Justice Marshall rejected the analogy to an attorney malpractice action, which was historically an action at law. According to Justice Marshall, a client controls significant aspects of the attorney's activity; such control is in contrast to the lack of control that an individual has with respect to union decisionmaking.[445]

However, in order to win a duty of fair representation action, the union member must show an underlying violation by the employer of the collective bargaining agreement; otherwise the union's refusal to bring the member's claim is perfectly justified. This factor led Justice Marshall to conclude that the members' action with respect to this crucial issue was most analogous to a contract action—traditionally an action at law.[446] Thus, in the plurality's view, there were two issues to be litigated; one was "trust-like" and the other was "contract-like." Since there were equitable and legal analogies of equal weight, Justice Marshall concluded that the first factor of historical comparability left the Court in "equipoise" as to whether the right to jury trial was applicable.[447]

Justice Marshall noted, however, that the historical analogy factor is only a preliminary consideration, and that the second prong of the two-pronged test, which focuses on the nature of the remedy, is "more important." Consequently, a finding of "equipoise" as to historical analogies (and presumably even a finding that the action is

444. *See id.* at 1345-49. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989); Tull v. United States, 481 U.S. 412 (1987).

445. *See Terry*, 110 S. Ct. at 1346-47.

446. *See id.* at 1347.

447. *See id.*

more analogous to a legal action than to an equitable action) does not prevent the Court from finding that the right to jury trial is guaranteed.[448]

Concerning the character of the relief (the more important second prong), Justice Marshall wrote for six members of the Court (adding Justices Brennan and Stevens), to conclude that a request for backpay and damages was in the nature of legal relief. The Court emphasized the general rule that money damages are considered a form of legal relief.[449]

One exception to this general rule is where the monetary relief sought is restitutionary, such as for disgorgement of improperly held profits.[450] The Court found this exception inapplicable to claims for breach of duty of fair representation, since there was no claim that the union was holding funds which they were obligated to restore to the members. Rather, the relief sought was for money the members would have received from the employer if the union had brought their claims.[451]

A second exception to the general rule that monetary damages constitute relief at law is where a monetary award is incidental or entwined with injunctive relief.[452] The Court found this exception inapplicable since the union members were not even seeking injunc-

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448. *See id.* at 1348-49.

449. *See id.* at 1347-48. In Blake v. Unionmutual Stock Life Ins. Co., 906 F.2d 1525, 1526-27 (11th Cir. 1990), the court, looking at "the nature of the issues involved and the remedy sought," (quoting *Terry*, 110 S. Ct. at 1341) held that the plaintiff was not entitled to a jury trial in an ERISA action to recover additional benefits under a group health policy. Plaintiffs argued that the suit was in law, not in equity, on the grounds that they were seeking money damages, not an equitable remedy, and that the change in the standard of review from arbitrary and capricious to de novo (made by Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)) had converted the action from an equitable claim to a breach of contract action. The court, however, characterized the claim for relief as one for enforcement of the ERISA plan, and the remedy sought as not money damages, but for benefits allegedly due them—"traditionally equitable relief." The standard of review did "not control the application of the Seventh Amendment." *Blake*, 906 F.2d at 1526. A case such as *Blake* shows that the issue of whether jury trial is guaranteed for statutory causes of action is a difficult one; despite the *Terry* Court's emphasis on the functional second prong of the test, there will continue to be ambiguity on whether the form of relief is equitable or legal. The Court's struggles in the eleventh amendment area, to determine whether the remedy is prospective or retrospective, show that to determine a result by the nature of the relief sought is a slippery concept at best. *See, e.g.*, Papasan v. Allain, 478 U.S. 265 (1986) (two claims for same relief, one held prospective, one held retrospective).

450. *See* Tull v. United States, 481 U.S. 412 (1987) (damage actions considered equitable where they are restitutionary).

451. *See Terry*, 110 S. Ct. at 1349.

452. *See Tull*, 481 U.S. at 424 (monetary award "incidental to or intertwined with injunctive relief" may be equitable).

tive relief in the action against the union; they were only seeking monetary damages.[453]

The Court rejected the union's argument that analogized the money at issue to backpay awards under title VII. Backpay awards under title VII have been labeled as equitable and restitutionary by the Court and by Congress.[454] Justice Marshall contended that there was no similar congressional expression with respect to the duty of fair representation; and that the purpose of an award for the duty of fair representation is different from that of other backpay awards. The duty of fair representation targets the wrong done to the individual employee, while other backpay awards effectuate the public interest in fair labor policy.[455]

Justice Brennan concurred with the Court as to the legal nature of the remedy sought. But he refused to join the Court's historical analysis on the ground that comparing modern statutory actions to eighteenth century English forms of action was a fruitless quest that ought to be discarded.[456]

Justice Brennan noted that the Court itself had downplayed the importance of finding an historical analogy; the Court had specifically stated in several cases that the second factor, the character of the remedy, is more important to the analysis.[457] In arguing for rejection of the first prong of the Court's test for jury trials in statutory actions, Justice Brennan emphasized pragmatic concerns: in light of the lack of weight that the Court has given the first prong, and the difficulty of its application, Justice Brennan argued that its continued application was not worth the candle.[458]

Justice Brennan noted the difficulty of conducting the historical comparison, given the shifting nature of legal and equitable claims in eighteenth century England. Justice Brennan argued that no modern statutory action is truly comparable with an eighteenth century English action at any rate, and so the quest for comparability must be imprecise at best.[459] Ambiguity and conflict is exacerbated by the fact that the line between law and equity was constantly shift-

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453. *See Terry*, 110 S. Ct. at 1348.

454. *See* Curtis v. Loether, 415 U.S. 189 (1974); 42 U.S.C. § 2000e-5(g) (1988).

455. *See Terry*, 110 S. Ct. at 1349.

456. *Id.* at 1350 (Brennan, J., concurring).

457. *See id. See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Curtis v. Loether, 415 U.S. 189 (1974).

458. *See Terry*, 110 S. Ct. at 1353.

459. *See id.* at 1351-52. *See* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theaters, Inc. v. Westover*, 116 U. PA. L. REV. 1, 2 (1967) ("The careful historian encounters difficulty in applying the fruits of his study to contemporary civil litigation

ing and often overlapping.[460] Given the difficulty of application of the historical forms of action test, and its lack of weight in any case, Justice Brennan concluded that the proper test for determining the right to jury trial is to look solely at what is now the second factor: the character of the remedy.[461]

Justice Stevens also attacked the plurality's reliance on historical analogies, but on different grounds from those of Justice Brennan. Justice Stevens argued that the duty of fair representation action was most analogous to a malpractice action.[462] According to Justice Stevens, the plurality's analogy to a trust action was misplaced because a duty of fair representation action involves no settlor, no trust instrument, and no corpus. Justice Stevens disagreement with Justice Marshall proves Justice Brennan's point that a quest for comparability with eighteenth century forms of action is doomed to failure. Justice Stevens also contended that the jury trial right should be granted whenever the issues presented are "typical grist for the jury's judgment."[463] Issues concerning employment relationships fall within that category in Justice Stevens' view.

Justice Kennedy, joined by Justices O'Connor and Scalia, dissented.[464] The dissenters expressed agreement with Justice Marshall's approach to the jury trial question as a two-pronged test; they also agreed that the duty of fair representation action was comparable to a trust action. To the dissenters, however, this comparability was dispositive in that it also indicated that the nature of the relief sought was necessarily equitable. Thus, while agreeing in principle with the two-pronged test, the dissenters would give the first prong of comparability dispositive weight, since it defines the claim as equitable for all purposes.[465]

Because Justice Kennedy views comparability as dispositive, he objected to the majority's issue-by-issue approach to comparable actions. According to Justice Kennedy, since the union members' ac-

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involving subject matter and procedural patterns unused, and sometimes unknown, in 1791.").

460. *See* James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

461. *See Terry*, 110 S. Ct. at 1353; Redish, *Seventh Amendment Right to Jury Trial: A Study in Irrationality of Rational Decisionmaking*, 70 NW. U.L. REV. 486, 490 (1975) (noting that common-law distinctions between law and equity were based not on the substantive cause of action, but on the nature of the remedy sought).

462. *See Terry*, 110 S. Ct. at 1353 (Stevens, J., concurring).

463. *Id.* at 1354.

464. *See id.* at 1355 (Kennedy, J., dissenting).

465. *See id.*

tion is most closely analogous to a trust action, any underlying issues in the action are subsumed within the equitable nature of the action as a whole. Justice Kennedy argued that in England, courts of equity could decide issues which in another form of action may have been decided at law. But that did not mean that the underlying issues made the action itself a legal action. In fact in the context of a trust action (the alleged referent for a fair representation suit) such issues could only have been brought in equity.

Finally, the dissent, in response to Justice Brennan's call to reject the historical comparability approach, emphasized the importance of a historical inquiry into English forms of action. Justice Kennedy feared that if the test for jury trial were to lose its historical moorings, the right to jury trial could be curtailed in the future by courts that might find the jury system outmoded.[466]

Obviously, Justice Kennedy is proceeding from a different point than Justice Brennan. To Justice Brennan, historical comparability of forms of action is of little use since it is barely relevant under the two-pronged test as it stands. To Justice Kennedy, historical comparability is given dispositive weight.[467] It should be noted, however, that despite Justice Kennedy's intimations to the contrary, Justice Brennan does not reject a historical analysis of the right to jury trial. Justice Brennan merely argues that a historical approach can be more reliably conducted if the Court focuses solely on the nature of the relief sought, and whether such relief was considered legal or equitable in 1791.[468]

Implications of Terry.—*Terry* reveals that there is doctrinal dispute and uncertainty about the importance of historical comparability of English forms of action among the members of the Court. The opinions are in disarray as to how much weight to give, or even how to determine, historical comparability. Confusion in the lower courts can be expected for new statutory causes of action. However, at this point, it is at least clear that lower courts must do some kind of inquiry to compare the action brought with eighteenth century English forms of action.[469]

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466. *See id.* at 1359.

467. *See id.* at 1348 n.8 (Marshall, J., majority opinion, stating the dissent would, "in effect, make the first part of our inquiry dispositive. We have clearly held, however, that the second part of the inquiry—the nature of the relief—is more important to the Seventh Amendment determination.").

468. *Id.* at 1350-53 (Brennan, J., concurring).

469. The Seventh Circuit tackled the problem in Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1350-51 (7th Cir. 1990). Examining a claim under § 36(b) of the Invest-

Terry also represents a conflict between two analytical strains that pervade the 1989-90 term: the need to adhere to tradition, and the need to simplify. With jury trial issues, these interests cannot be reconciled. It is interesting that Justice Scalia joined with Justice Kennedy in dissent, adhering to tradition at the expense of simplification.

The Court in *Terry* leaves open whether there is a jury trial right for title VII backpay actions. However, the analysis in *Terry* clearly points to the ultimate conclusion that there is no right to jury trial for such an action. Congress and the Court have labeled a title VII action as equitable and the relief as restitutionary (though not specifically in a jury trial context).[470] The Court's holding that there is a right to jury trial for damages actions for breach of the duty of fair representation overrules lower court precedent.[471]

B. *Limitation on Issue Preclusion of Legal Claims*: Lytle v. Household Manufacturing, Inc.[472]

Lytle brought an action in federal court for employment discrimination, alleging causes of action under two separate statutes: title VII and 42 U.S.C. section 1981.[473] The district court erroneously dismissed Lytle's section 1981 claim.[474] The title VII action then proceeded to a bench trial. At the close of the plaintiff's evidence, the district court invoked rule 41(b) of the Federal Rules of Civil Procedure and dismissed one title VII claim (discharge) as unproven; he entered judgment for defendant on another title VII claim (retaliation) at the close of all the evidence. On appeal, the Fourth Circuit found that the section 1981 claim had been erroneously dismissed, but ruled that the district court's findings on the

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ment Company Act of 1940, 15 U.S.C. § 80a-35(b) (1988), the court characterized the claim as one for breach of fiduciary duty and the remedy as restitutionary (disgorgement) and found that the plaintiff was not entitled to a jury trial. Judge Easterbrook noted the difficulties created by *Terry*: "Although any prediction is hazardous, we conclude that the Court would think an action under section 36(b) equitable under the analysis it used in *Terry*. . . . Four different opinions in *Terry*, advocating four different approaches to the constitutional question, render perilous any predictions." *Id.* at 1351.

470. *See, e.g.*, Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987) (no right to jury trial in title VII action for backpay).

471. *See* Leach v. Pan American World Airways, 842 F.2d 285, 288-91 (11th Cir. 1988) (no right to jury trial for actions for breach of duty of fair representation).

472. 110 S. Ct. 1331 (1990).

473. *Id.* at 1334.

474. *Id.* at 1335. The district court erroneously concluded that title VII was the exclusive vehicle for claims of employment discrimination. This reasoning was rejected in several Supreme Court decisions, including Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

title VII claim precluded the plaintiff from litigating the section 1981 claim.[475]

The Supreme Court, in a unanimous opinion by Justice Marshall, held that where a trial court erroneously dismisses legal claims, and then determines issues common to both equitable and legal claims, the seventh amendment prohibits the trial court's determinations from being given preclusive effect in the subsequent legal action.[476]

The Court assumed, without deciding, that there is no right to jury trial in title VII actions.[477] If the section 1981 claim had not been erroneously dismissed, it is clear that plaintiff would have had a jury trial right on issues common to both legal and equitable claims; and it is also clear that the jury would have been required to resolve those claims before the court decided the title VII claims.[478]

Given these undisputed premises, the Court concluded that an erroneous dismissal of the legal claims could not change the result.[479] Since the trial court cannot deny the plaintiff a jury trial on common issues if it acts properly by entertaining both claims, it *a fortiori* cannot do so by erroneously dismissing the legal claim.[480]

The Court distinguished its decision in *Parklane Hosiery Co. v. Shore*[481] where it held that a court's determination of issues in an equitable action was entitled to preclusive effect in a later action at law. In *Parklane*, the legal and equitable actions were never joined,

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475. *See* Lytle v. Household Mfg., Inc., 831 F.2d 1057 (4th Cir. 1987), *vacated*, 110 S. Ct. 1331 (1990).

476. *See Lytle*, 110 S. Ct. at 1338. *See* McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), which presents the reverse situation: plaintiff sued under section 1981 and title VII; after the jury found for the plaintiff on the section 1981 claim, the district court judge, on the basis of the jury's verdict, entered judgment for the plaintiff on the title VII claim as well. *Id.* at 107. On appeal, *Patterson* was held to apply retroactively, and the judgment on the section 1981 claim was reversed. *Id.* at 110-12. The issue then was whether the jury's section 1981 findings still had preclusive effect on any common factual issues presented by the title VII claims. The Seventh Circuit held that they were preclusive. *Id.* at 113.

In *Lytle*, the Court found that the section 1981 claims were not precluded by the findings in the title VII action, but remanded the case to determine whether the section 1981 claims were viable after the intervening decision of *Patterson v. McLean Credit Union*. *Lytle*, 110 S. Ct. at 1338. For a discussion of section 1981 claims that may remain viable after *Patterson*, see Gonzalez v. Home Ins. Co., 909 F.2d 716, 722 (2d Cir. 1990) (action for termination may be viable if person enters into contract with intent to terminate it for reasons of racial animus).

477. *See Lytle*, 110 S. Ct. at 1335 n.1. *See also supra* note 470 and accompanying text.

478. *Lytle*, 110 S. Ct. at 1335. *See* Dairy Queen v. Wood, 369 U.S. 469 (1962).

479. *See Lytle*, 110 S. Ct. at 1336.

480. *Id.* at 1336-37.

481. 439 U.S. 322 (1979).

nor could they have been;[482] so it was appropriate for the court to decide the equitable claims first. Here, it was not appropriate; the only reason the equitable claims were tried first was due to an erroneous ruling of the trial court.[483]

The Court rejected the argument that the important principles behind issue preclusion (preventing duplicative litigation and harassment) required application of issue preclusion in this case. Here, Lytle had tried to avoid duplicative litigation by bringing title VII and section 1981 claims in the same action. Multiple litigation in this case is the result of court error; and in light of that court error, the Court found that relitigation was a necessary cost of enforcing the right to jury trial.[484]

The defendant argued that even if preclusion did not apply, a jury trial was unnecessary in this case. Defendant reasoned that the trial judge would have directed a verdict as to the section 1981 claim even if he had heard it.[485] The basis of this argument was that the trial judge had dismissed the substantially similar title VII claims, acting as the trier of fact under rule 41(b) of the Federal Rules of Civil Procedure.

Justice Marshall found that this argument confused the trial court's role as trier of fact under rule 41(b) from the trial court's role at a jury trial in determining the propriety of a directed verdict. Under rule 41(b), the judge acts as the trier; for a directed verdict, the question is whether there is a reasonable basis for disagreement that must be left for the jury to decide.[486] Thus, the fact that the trial court found for the defendant as trier of fact in no way means that he would have taken the case away from the jury.[487]

Implications of Lytle.—*Lytle* does not signal a retreat from the Court's commitment in *Parklane* to vigorous application of issue preclusion. Rather, it deals with a situation to which *Parklane* cannot fairly apply. If *Parklane* were applied in the *Lytle* situation, the plaintiff would be assuming the burden of trial court error. The important guarantee of the right to jury trial cannot be left to the whim of

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482. The equitable claims were brought in an SEC enforcement action, and the legal claims were later brought in individual damage actions.

483. *Lytle*, 110 S. Ct. at 1336-37.

484. *See id.* at 1337.

485. *See* Galloway v. United States, 319 U.S. 372 (1943) (directed verdict does not violate the seventh amendment).

486. On the standards for a directed verdict, see generally R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 673-97 (6th ed. 1990).

487. *See Lytle*, 110 S. Ct. at 1338.

erroneous dismissal. Vigorous enforcement of the right to jury trial is consistent with adherence to tradition and limitation on judicial authority.

VII. CIVIL RIGHTS

A. Overview

In the 1989-90 term, the Supreme Court decided several cases concerning causes of action for violation of civil rights under 42 U.S.C. section 1983. One of these cases, *Howlett v. Rose*,[488] has little or no impact on section 1983 litigation in the federal courts. Another, *Ngiraingas v. Sanchez*,[489] has impact only in cases involving United States territories. Two cases hold that particular federal statutes create substantive causes of action that could be enforced under section 1983.[490] In *Golden State Transit Corp. v. Los Angeles*,[491] the Court held that the National Labor Relations Act creates a right enforceable under section 1983 protecting the collective bargaining process from state government interference.[492] In *Wilder v. Virginia Hospital Association*,[493] the Court upheld the right of health care providers to sue under section 1983 to enforce provisions of the Boren Amendment to the Medicaid Act, which require that reimbursement rates be reasonable and adequate.[494] The fifth case constitutes an expansion of procedural due process rights that can be enforced in federal courts. That decision is discussed below.

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488. 110 S. Ct. 2430, 2442-43 (1990) (state law sovereign immunity defense is not applicable in section 1983 action in state court, where such defense would not be available if the action were brought in a federal forum).

489. 110 S. Ct. 1737, 1742-43 (1990) (territories are not "persons" subject to suit under section 1983).

490. *See* 42 U.S.C. § 1983 (1988). Section 1983 generally allows recovery for the violation of federal statutory rights. *See generally* Maine v. Thiboutot, 448 U.S. 1, 4 (1980). *But see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981) (no statutory cause of action under section 1983 if the statute merely declares congressional policy or if the statute creates its own exclusive enforcement scheme).

491. 110 S. Ct. 444 (1989). Justice Stevens wrote the majority opinion for six Justices. Justice Kennedy dissented in an opinion joined by Chief Justice Rehnquist and Justice O'Connor.

492. *See id.* at 2525.

493. 110 S. Ct. 2510 (1990). Justice Brennan wrote the opinion for a five-person majority. Chief Justice Rehnquist wrote a dissenting opinion joined by Justices O'Connor, Scalia, and Kennedy.

494. *See id.* at 2325.

B. Post-deprivation Remedy Does Not Satisfy Due Process Where State Officials Were Authorized to Effect Deprivation and Provide Predeprivation Process: Zinermon v. Burch[495]

Burch was admitted to a Florida state mental hospital. Under state law, a patient could be voluntarily admitted upon written consent, but an involuntary commitment required procedural safeguards such as notice and a hearing.[496] Burch signed the consent form and was admitted without the institution of involuntary commitment procedures. In his section 1983 action, Burch alleged that he was not competent to voluntarily commit himself and that the failure of hospital officials to initiate involuntary proceedings deprived him of procedural safeguards mandated under Florida law and the Constitution. He claimed damages for a violation of his due process rights.[497]

The district court granted defendant's motion to dismiss on the ground that the state officials' actions were random and unauthorized under *Parratt v. Taylor*[498] and *Hudson v. Palmer*,[499] so that post-deprivation remedies were all that could possibly be provided by Florida. Burch did not challenge the adequacy of these state remedies, presuming that the state could not provide predeprivation remedies.[500]

A plurality of the Eleventh Circuit, in an en banc decision, held that *Parratt* did not apply because Florida could have provided predeprivation remedies.[501] Other members of the court found that Burch had suffered a substantive due process violation, which could not be remedied by procedures.[502]

Justice Blackmun, writing for five members of the Court, held that (1) the *Parratt-Hudson* limitation is applicable to deprivations of liberty as well as property;[503] but (2) *Parratt* and *Hudson* are inapplicable where the state has delegated unconstrained authority to cause deprivations and to determine whether procedural safeguards should be provided. When such delegation occurs, a subsequent

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495. 110 S. Ct. 975 (1990).
496. *See id.* at 982; FLA. STAT. § 394.463 (1990).
497. *Zinermon*, 110 S. Ct. at 977.
498. 451 U.S. 527 (1981).
499. 468 U.S. 517 (1984).
500. *Zinermon*, 110 S. Ct. at 978-79.
501. *See* Burch v. Appalachee Community Mental Health Servs., Inc., 840 F.2d 797, 801-02 (11th Cir. 1988), *aff'd sub nom.* Zinermon v. Burch, 110 S. Ct. 975 (1990).
502. *See id.* at 803 (Johnson, J., specially concurring); *id.* at 804 (Clark, J., concurring); *id.* at 808 (Anderson, J., concurring).
503. *See Zinermon*, 110 S. Ct. at 987.

deprivation is not "random and unauthorized" within the meaning of *Parratt-Hudson*.[504]

The Court did not rule on whether Burch had alleged a substantive due process claim or any other federal constitutional claim (for example, unreasonable seizure).[505] Nor did the Court decide whether the Florida safeguards were reasonable if no pre-deprivation safeguards could be provided.[506]

In holding that *Parratt* could apply to deprivations of liberty (a holding with which all members of the Court agreed),[507] Justice Blackmun reasoned as follows: *Parratt* was based on the state's inability to provide procedural safeguards before a deprivation occurs. In such circumstances, the state does the best it can by providing a post-deprivation remedy, and there is consequently no violation of the plaintiff's right to procedural due process. Thus, *Parratt* focused on the state's ability or inability to provide process, not on the nature of the deprivation suffered by the plaintiff. The rationale of *Parratt* therefore applies equally to deprivations of liberty and property. If process is impossible to provide it doesn't matter whether the deprivation is one of liberty or property. In either case, the only thing the state can do is provide an adequate post-deprivation remedy.[508]

In establishing a "delegated authority" exception to *Parratt*, Justice Blackmun began his analysis with an overview of section 1983 claims for violations of due process. Justice Blackmun explained that there are three types of section 1983 claims that may be brought for due process violations:

1. For violation of a Bill of Rights protection made applicable to the states via the fourteenth amendment.

2. For a violation of the substantive component of the due process clause.

3. For a violation of the guarantee of fair procedure upon a deprivation of a liberty or property interest.[509]

The Court held that the *Parratt* doctrine can apply only to the last type of claim—for a violation of procedural due process.[510] The

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504. *See id.* at 989-90.

505. *See id.* at 983-84.

506. *See id.* at 990; *see also* Marcus, *Wanted: A Federal Standard for Evaluating the Adequate State Forum*, 50 MD. L. REV. 131 (1991).

507. *See id.* at 990-91 (O'Connor, J., dissenting).

508. *Id.* at 987.

509. *See id.* at 983.

510. *See id.* at 985.

other two claims constitute constitutional wrongs regardless of the fairness of the procedures used. In contrast, a procedural due process claim is not complete until the state has failed to provide adequate process.[511]

Justice Blackmun recognized that the general test for determining the procedural process that is due is the three-pronged test of *Mathews v. Eldridge*.[512] The Court in *Mathews* weighed the private interest at stake, the risk of an erroneous deprivation and the value of additional safeguards in decreasing the risk of mistaken deprivations, and the state interest in avoiding the imposition of additional safeguards.[513]

Justice Blackmun contended that the *Parratt* rule is a special application of the *Mathews* test, in which one of the *Mathews* prongs (the second one) is dispositive.[514] Where the deprivation is random and unauthorized, there is no value to the additional safeguards demanded (i.e., pre-deprivation notice) since such safeguards cannot be effectuated. No matter how high the personal interest and the risk of erroneous deprivation, the state cannot do the impossible.[515]

The majority found that, unlike *Parratt*, pre-deprivation safeguards would be both possible and valuable in situations where state officials have broad authority to cause deprivations and provide pre-deprivation process.[516] In *Zinermon*, Florida statutes delegated a broad power to hospital staff to determine whether a person who signs a commitment form is competent to do so. As a result, staff members have been delegated authority to commit patients without resort to the procedures attendant to involuntary commitment.[517]

Justice Blackmun concluded that such broadly delegated power, with no limitations or guidance in the statute, rendered the officials' actions *authorized* by the state and thus *Parratt* was inapplicable. The majority reasoned that the state could do better to prevent the deprivation of liberty. It could control the discretion of the hospital staff to determine whether a person who signs a commitment form is competent. Concomitantly, it could control the discretion of the

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511. *Id.* at 983.

512. 424 U.S. 319 (1976).

513. *See id.* at 335.

514. *See Zinermon*, 110 S. Ct. at 985.

515. *See id.*; Easter House v. Felder, 910 F.2d 1387, 1398 (7th Cir. 1990) (en banc) (*Parratt* is not limited to insubstantial deprivations; if it is impossible to provide procedural safeguards, then post-deprivation remedies can be sufficient even if the interest at stake is substantial), *cert. denied*, 111 S. Ct. 783 (1991).

516. *See Zinermon*, 110 S. Ct. at 990.

517. *Id.* at 988.

staff in determining whether or not to invoke the procedural safeguards surrounding involuntary commitment.[518] Justice Blackmun declared that "[b]ecause petitioners had State authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occurs without adequate procedural protections."[519]

The majority distinguished *Parratt* on three grounds: first, the deprivation in *Zinermon* was predictable. It occurs when the patient signs the consent forms, and since it occurs at a predictable point, it can be prevented in advance.[520] But, as Justice O'Connor pointed out in dissent, this is a difference in degree rather than in kind.[521] In *Parratt*, it was predictable that the state actor who lost the hobby kit addressed to Taylor would indeed negligently lose some mail at some point. The Court's attempt to distinguish *Parratt* as a case where the state could not predict "precisely" when the loss would occur is equally unpersuasive, since the state in *Zinermon* cannot tell "precisely" when an incompetent person will sign a voluntary consent form. More important, it is a nonsequitur to say that the state can predict, therefore it can prevent. The deprivation in *Parratt* happened at a precise point—when the hobby kit was lost; but that did not render the deprivation preventable. The Court equates predictability with preventability, but the two concepts are not coterminous.

Second, Justice Blackmun asserted that in *Parratt*, pre-deprivation process was "impossible." The state could not, through rulemaking, prevent the loss from occurring (for example, by a rule telling officials not to lose mail). In contrast, in *Zinermon*, the deprivation of liberty could be prevented by limiting and guiding the discretion of hospital staff to admit patients.[522] This alleged distinction (and indeed the entire majority opinion) is based on the questionable assumption that controls on discretion would prevent the deprivation from occurring. When the Court in *Parratt* spoke of random and unauthorized acts, it must have been thinking of cases where state actors cause deprivations contrary to state law. That is what it means to be "unauthorized." If that is the case, the fact that the state law could impose discretionary guidelines is arguably irrel-

518. *See id.* at 989-90.
519. *Id.* at 988.
520. *See id.* at 989.
521. *See id.* at 992 (O'Connor, J., dissenting).
522. *See id.* at 989-90.

evant, since *Parratt* concerns the very situation where state laws are broken by unauthorized state officials.

Finally, Justice Blackmun contended that acts of the staff in *Zinermon* were authorized, because the state delegated to the staff the power to commit patients, and the power to decide whether the procedural safeguards of an involuntary commitment were warranted. In contrast, the acts in *Parratt* and *Hudson* were unauthorized since the officials were not given the authority to effect a property deprivation or to determine whether safeguards should be effectuated.[523] Again, this is arguably a difference in degree rather than in kind. The employees in both *Parratt* and in *Hudson* were given the authority to affect the property and liberty interests of prisoners.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented. Justice O'Connor argued that the majority confused the considerations underlying the second prong of *Mathews* with the general limitation in *Parratt-Hudson* that a state cannot be expected to forestall deprivations by state actors who are bent on violating state law.[524]

According to Justice O'Connor, the suggested safeguards in *Zinermon* would merely be one more set of standards that could be violated by low-level state actors acting in random and unauthorized fashion. The question is not what safeguards can be put in place, but rather whether the state can be expected to prevent the violation of such safeguards. *Parratt* says that the answer is "no" when the act is random and unauthorized. For Justice O'Connor, predictability and preventability are not always the same thing.

Justice O'Connor pointed out that in both *Parratt* and *Hudson*, additional measures could have been instituted (*e.g.*, better training) that would have arguably made the deprivations less likely to occur. But that was not relevant to the Court's concerns in *Parratt*. According to the dissent, *Parratt* does not focus on the procedures the state has in place, but rather upon whether a departure from those procedures can be prevented.[525]

Justice O'Connor asserted that the Court's reliance on the state's delegation of authority to distinguish *Parratt* was misplaced. Justice O'Connor reasoned that the officials in *Parratt* had authority delegated to them as well. The crucial question is whether a depri-

523. *See id.* at 990.
524. *See id.* at 993 (O'Connor, J., dissenting).
525. *See id.* at 993-94.

vation can be controlled by the state. And in this respect, the officials in neither *Parratt* nor *Zinermon* were delegated the authority to act improperly.[526]

The dissent recognized that the rule would be otherwise if the deprivation were caused by established state procedure, or by a pattern of wrongful conduct that would be tantamount to an established state procedure.[527] In those cases, the state can take pre-deprivation action by changing the law that actually is causing the deprivation (as to established state procedure) or by disciplining or firing employees engaged in a pattern of wrongful conduct. But the majority admits that neither of these circumstances is applicable in *Zinermon*.[528]

Justice O'Connor predicted that the majority's new "delegation of authority" exception to *Parratt* would create significant line-drawing problems and confusion.[529] How circumscribed must discretion be to avoid due process liability? How likely must the risk of wrongful deprivation be before authority must be circumscribed? The majority opinion is, to say the least, nonspecific on these points.[530]

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526. *See id.* at 994-95.

527. *See id.* at 994.

528. *See id.* at 979 & n.3.

529. *See id.* at 995 (O'Connor, J., dissenting).

530. Confusion over the impact of *Zinermon* has indeed arisen in the lower courts. *See* Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) (en banc) (adoption agency alleged conspiracy by licensing officials to deprive it of renewal license), *cert. denied*, 111 S. Ct. 783 (1991). In *Easter House*, Judge Kanne stated that the question under *Zinermon* was "whether the appellants' conduct may still be characterized as 'random and unauthorized' such that *Parratt* will preclude an award of § 1983 liability." *Id.* at 1398. The court rejected the argument that a conspiracy, because intentional, was per se non-random conduct, stating that the "licensing conspiracy was nothing more than a random decision of state employees to disregard state policy and procedure." *Id.* at 1399. The court also rejected the argument that "*Zinermon* creates a per se employee-status exception to *Parratt*." *Id.* at 1400. The court stated:

> The question of whether a state official ranks "high" or "low" in the state hierarchy, while possibly relevant as indicia of the discretion which that official exercises, cannot by itself be dispositive of this determination [of whether the conduct was predictable and authorized]. . . . Rather we believe that there must be a second ingredient in the "predictability" equation which focuses on the extent to which the state official's discretion is "uncircumscribed."

Id. at 1400.

The majority in *Easter House* found that state law sufficiently circumscribed the officials' discretion; unlike the Florida law in *Zinermon*, the Illinois law did not give the official authority to deprive the plaintiff of a property interest without a hearing. The court in *Easter House* concluded that if an official's discretion is circumscribed by pre-deprivation procedural safeguards, and there is no reason to know that state law would be disregarded, then an abuse of that limited discretion is not "predictable" from the point of view of the state, and thus does not fall under *Zinermon*. *Id.* Judge Cudahy dissented, joined by Judge Posner and Judge Cummings, *id.* at 1410, and, like the Fifth Circuit in

Finally, Justice O'Connor concluded that the majority had undermined *Mathews* by adding a new tier of analysis to the question "what process is due?" After *Zinermon*, if the state has given insufficiently controlled discretion, there is a due process violation and the *Mathews* three-pronged test is apparently bypassed. Justice O'Connor feared that given its vagueness and breadth, the majority's "delegation" exception will swallow the rule of *Mathews*.[531]

Implications of Zinermon.—*Zinermon* continues the Court's emphasis in the 1989-90 term on the need to control official discretion, but this time a fair application of that principle is in conflict with the federalism principles that underlie the *Parratt* doctrine. It is signifi-

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Caine v. Hardy, 905 F.2d 858 (5th Cir. 1990), *reh'g granted* (Aug. 3, 1990), stated that *Zinermon* holds that a pre-deprivation hearing is required, where possible, when the occurrence of a constitutional deprivation is not unforeseeable. *Easter House*, 910 F.2d at 1410. *See Caine*, 905 F.2d at 862. A concurring opinion in *Easter House* describes the Supreme Court's "hair-splitting" in *Zinermon* and comments, "Such hair-splitting leaves judges of the inferior federal courts in a difficult position, because any effort to reconcile and apply the cases will be met with a convincing demonstration (which Judge Cudahy has supplied) that there is a fly in the ointment" and predicts that "a line of precedent already resembling the path of a drunken sailor may take a new turn." *Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring).

531. The lower court cases since *Zinermon* have to some extent borne out Justice O'Connor's prediction. In *Caine*, 905 F.2d at 862 (reversing district court's dismissal of section 1983 deprivation of due process claim brought by doctor suspended from privileges at public hospital), the court gave this interpretation of *Zinermon*: "The lesson of *Zinermon* is that the *Parratt/Hudson* doctrine is restricted to cases where it truly is impossible for the state to provide predeprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor." *Id.* In a strenuous dissent, Judge Edith Jones pointed out that the plaintiff doctor had been suspended under a hospital regulation that authorizes summary suspension when a practitioner's conduct "requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damages to . . . any patient." *Id.* at 863 (Jones, J., dissenting). Judge Jones contended that *Zinermon* did not give plaintiff the right to pre-deprivation process in such emergency circumstances. *Id.* at 864. Moreover, the plaintiff's allegations that the hospital committee had acted through bias and with anti-competitive purposes, if true, meant that their actions were unauthorized and thus fell under *Parratt/Hudson* rather than *Zinermon*. *Id.* at 867. *See also* Matthias v. Bingley, 906 F.2d 1047, 1057 (5th Cir. 1990) (city's policy of disposing of seized property, without notice to person from whom property was seized unless officer believed that person to be lawful owner was deprivation of due process under *Zinermon* because predeprivation process was possible), *modified on other grounds on denial of reh'g*, 915 F.2d 946 (5th Cir. 1990)

In Fields v. Durham, 909 F.2d 94 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 786 (1991), the original dismissal under *Parratt/Hudson* of a due process claim had been vacated by the Supreme Court and remanded for reconsideration in light of *Zinermon*. *Id.* at 95-96. After reviewing supplemental briefs, the Fourth Circuit decided that the plaintiff, a fired college dean, had received adequate pre-deprivation process (including notice of termination and opportunity for hearing) and post-deprivation process. *Id.* at 99.

cant that the more conservative members of the Court chose federalism interests over the need to control official discretion.

The dissenters emphasize that the case would have been different if the wrongdoing had been pervasive rather than an isolated act. Whether a pattern or practice of wrongful deprivations by low-level officials could be an exception to *Parratt* had been in dispute in the courts prior to *Zinermon*.[532] The dissent's readiness to embrace such an exception would appear to resolve this conflict.[533] It is appropriate to find *Parratt* inapplicable where there is a pattern or practice of misconduct, since if there is a de facto policy of wrongful deprivations, an act pursuant to that policy cannot fairly be deemed random and unauthorized.

The dissent's argument that the majority's "delegated authority" exception to *Parratt* will be difficult of application is somewhat overstated. While it is certainly not a bright-line test, several circuits have applied a similar exception before *Zinermon*.[534] The "delegated authority" exception established by *Zinermon* would appear to deprive *Parratt* of significant effect. It can apply to the act of any official, even low-level officials, if they are given "broad" authority to effect a deprivation.[535]

On the other hand, the state has a relatively easy way by which to satisfy *Zinermon* and thus invoke the *Parratt* doctrine. All that needs to be done is to write a statute that circumscribes authority.[536] If the statute is not complied with by the official, the official's act is random and unauthorized under both *Parratt* and *Zinermon*. This underscores Justice O'Connor's contention that controls on discretion would just be one more set of laws that low-level officials would violate. Of course, simply writing a statute will not be sufficient at the

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532. *See* Gregory v. Town of Pittsfield, 470 U.S. 1018, 1022 (1985) (O'Connor, Brennan, and Marshall, JJ., dissenting from denial of certiorari) (general practice contrary to state law, in which state officials chose not to provide written notice to applicants denied general assistance, renders *Parratt* inapplicable); Vinson v. Campbell County, 820 F.2d 194, 199 (6th Cir. 1987) (no policy or custom exception to *Parratt*).

533. *See* Easter House v. Felder, 910 F.2d at 1401 (post-*Zinermon*; where state would have reason to know that officials would violate state law, then post-deprivation process would not be sufficient).

534. *See, e.g.*, Patterson v. Coughlin, 761 F.2d 886, 892 (2d Cir. 1985) (responsible state officials who had final authority to grant a hearing, failed to provide sufficient process before the deprivation), *cert. denied*, 474 U.S. 1110 (1986).

535. *See Easter House*, 910 F.2d at 1400 (*Zinermon* is not based on the high or low-level status of the state employee, but on whether the employee is given unfettered discretion to act).

536. *See id.* (*Zinermon* inapplicable where high-ranking official's authority is circumscribed by state law).

point where it is routinely violated by state officials. But until that time, the statute itself will suffice to trigger *Parratt*.

VIII. ATTORNEY'S FEES AND SANCTIONS

The Supreme Court decided two cases on the collectibility of attorney fees in civil rights actions. Both cases were decided in favor of fee claimants. The Court also decided two cases concerning attorney sanctions. Both cases represented a literal approach to rule 11 sanction provisions.

A. Contingent Fee Contracts for More than the Statutory Award Are Enforceable: Venegas v. Mitchell[537]

Venegas obtained a judgment in a section 1983 action. Venegas had entered into a contingent fee contract with his attorney, Mitchell. The contract provided Mitchell a fee that was more than $300,000 greater than that awarded by the district court under 42 U.S.C. section 1988. The Ninth Circuit held that section 1988 does not prevent a lawyer from collecting a reasonable fee pursuant to a contingent fee contract, even though it exceeds the statutory award.[538]

In a unanimous opinion written by Justice White, the Supreme Court held that section 1988 does not prevent the lawyer's collection of a reasonable contingent fee that is greater than the statutory award.[539] Justice White reasoned that nothing in the language of section 1988 regulates the financial relationship between the plaintiff and the attorney.

The fundamental premise of the majority's analysis is that section 1988 establishes a right in the prevailing party to receive attorney's fees;[540] it does not regulate what the lawyer is actually paid. This is why a statutory award is not limited by a contingent fee agreement for a lesser fee,[541] and also why a fee can be awarded even to those plaintiffs who did not need a fee to maintain their litigation.[542] The Court concluded that section 1988 governs only

537. 110 S. Ct. 1679 (1990).

538. 867 F.2d 527 (9th Cir. 1981).

539. *See Venegas*, 110 S. Ct. at 1683.

540. For a discussion of "prevailing," see Crowder v. Housing Auth. of City of Atlanta, 908 F.2d 843, 848-49 (11th Cir. 1990) (plaintiffs who agreed to settle their case if a permanent injunction was filed in the district court had prevailed and were entitled to section 1988 attorney's fees).

541. *See* Blanchard v. Bergeron, 489 U.S. 87, 96 (1989).

542. *See* Blum v. Stenson, 465 U.S. 886, 895 (1984) (plaintiff entitled to award under section 1988 even though represented free of charge by nonprofit organization).

what the losing party must pay to the prevailing party. It says nothing about what the prevailing party must pay to his lawyer. Justice White rejected Venegas' argument that the contingent fee was itself unreasonable. The Court found nothing in the record in this case to disturb the conclusion of the lower courts that the contingent fee was reasonable.[543]

Implications of Venegas.—The Court in *Venegas* noted that it had not clearly resolved whether the statutory award may be enhanced upward from the lodestar figure based on the contingent factor of a possibility of nonrecovery.[544] The three opinions in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*[545] can be read to indicate that a majority of Justices at that time found it appropriate to adjust upward from the lodestar figure for contingencies, at least under certain circumstances.[546] In *Venegas*, the Court assumed without deciding that section 1988 did not allow an upward adjustment; even if it did not, the section 1988 award does not control the relationship between the plaintiff and his lawyer.[547] So a lawyer can negotiate for a contingency even though the court may not be allowed to compensate for one.

In *Venegas*, both lower courts found the forty percent contingent fee to be reasonable.[548] The Supreme Court in *Venegas* found it unnecessary to address the scope of the federal courts' authority to regulate contingent fees in civil rights cases, but there seems little doubt that a federal court can invalidate an excessive fee.

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543. *See Venegas*, 110 S. Ct. at 1683.

544. *See id.* at 1682.

545. 483 U.S. 711 (1987).

546. *See id.* at 729-30; *id.* at 731 (O'Connor, J., concurring); *id.* at 735 (Blackmun, J., dissenting); King v. Palmer, 906 F.2d 762, 765 (D.C. Cir. 1990) (one hundred percent contingent fee enhancement allowed; court followed the two-part test suggested by Justice O'Connor in *Delaware Valley*: whether the legal market adds a premium for contingency, and whether in the absence of an enhancement for risk the plaintiff would have faced substantial difficulty in finding counsel); Lattimore v. Oman Constr., 868 F.2d 437, 440 (11th Cir. 1989) (title VII case affirming one hundred percent enhancement of lodestar amount of fee award under *Delaware Valley*). *Cf.* D'Emanuele v. Montgomery Ward & Co., 904 F.2d 1379, 1382-86 (9th Cir. 1990) (discussing calculation of lodestar amount, and factors in enhancing or decreasing award, under ERISA attorney fee provision).

547. *See Venegas*, 110 S. Ct. at 1682-83.

548. *See id.* at 1684.

B. *A Finding of "No Substantial Justification" is Not Required for the Fee Litigation Itself:* Commissioner, Immigration and Naturalization Service v. Jean[549]

Plaintiffs were prevailing parties within the meaning of the Equal Access to Justice Act (EAJA).[550] The government's position in the underlying litigation was held to be not substantially justified, and this holding was not contested on appeal. A fee hearing was conducted, and the Supreme Court assumed that the government's position as to the amount of fees to be awarded was (unlike the government's position on the merits) substantially justified.[551] The question in the Supreme Court was whether the prevailing party could collect attorney's fees for the fee litigation itself,[552] without a finding by the district court that the government's position in the fee litigation was not substantially justified.

The Supreme Court, in a unanimous opinion by Justice Stevens, held that fees for fee litigation could be collected under the EAJA even if the government's position at the fee litigation was substantially justified. The Court reasoned that a finding of no substantial justification as to the merits covers all phases of successful litigation, including a successful litigation as to fees.[553]

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549. 110 S. Ct. 2316 (1990).

550. 28 U.S.C. § 2412 (d)(1)(A) (1988).

551. *See Jean*, 110 S. Ct. at 2318. For the meaning of "substantially justified," see Public Citizen Health Research Group v. Young, 909 F.2d 546, 552 (D.C. Cir. 1990) (litigating position is substantially justified if there is "a reasonable basis in fact and law" for it); Trahan v. Brady, 907 F.2d 1215, 1218 (D.C. Cir. 1990) (" 'substantially justified' means 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person . . . . [A] position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct . . . .").

552. Several courts have held that the EAJA provision for attorney's fees does not apply to INS administrative hearings. *See* Clarke v. INS, 904 F.2d 172, 178 (3d Cir. 1990); Ardestani v. INS, 904 F.2d 1505 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991). *But see* Pollgreen v. Morris, 911 F.2d 527, 534 (11th Cir. 1990) (INS administrative proceedings may be sufficiently linked with the resolution of a civil action to be included in an EAJA attorney's fees award.)

553. *See Jean*, 110 S. Ct. at 2320. In Alizadeh v. Safeway Stores, Inc., 910 F.2d 234 (5th Cir. 1990), the losing plaintiff in a section 1981 case appealed the award of attorney's fees to the defendant, and argued that if her appeal was successful, she should be awarded attorneys' fees for successfully defending against the imposition of attorney's fees. *See id.* at 238 n.4. The court found that even if "one not a prevailing party on the merits can be a prevailing party so as to be entitled to section 1988 attorneys' fees for successfully resisting the imposition of attorneys' fees thereunder," the plaintiff was not the prevailing party on the attorneys' fees appeal. *Id.* Although the district court was directed to reconsider the amount of attorney's fees because of plaintiff's poverty, the award of attorney's fees to the defendant was affirmed. *See id.* at 239. The court did not

The Court viewed the text of the EAJA as providing one threshold test for fee eligibility, as a consequence of treating an entire case as an inclusive whole—not a series of separate proceedings.[554] The Court also relied on the purpose of the EAJA: to eliminate financial disincentive to challenge improper government actions. Justice Stevens argued that if the government could impose the cost of fee litigation itself on the plaintiff by asserting a "substantially justified" defense to fees, then the financial deterrent to citizens' actions would be resurrected—especially since in many cases the fees may be greater than the underlying award.[555]

Implications of Jean.—The Court stated that if the plaintiff does not prevail in his fee application, expenditure of fees to prove such a fee application would not be collectible. Justice Stevens asserted that such a result is mandated by *Hensley v. Eckerhart*,[556] which requires the district court to consider the relationship between the amount of fees to be awarded and the results obtained.[557] Thus, a plaintiff who won on the merits but lost on the fee application would still be a prevailing party under the *Jean* single-threshold test. But he would not recover fees for money spent in a losing effort at the fee litigation, because of the limitations prescribed by *Hensley* on the amount of the fee to be awarded to a prevailing party.[558]

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consider whether the defendant was entitled to attorneys' fees for the fee litigation. *Id.* at 238 n.4.

554. Although *Jean* states that there is to be "only one threshold determination for the entire civil action," *Jean*, 110 S. Ct. at 2319, according to *Public Citizen Health Research Group*, 909 F.2d at 552, if a position is substantially justified initially, fees may be collected only for litigation occurring after the position is no longer substantially justified. *See id.* (government's position substantially justified until publication of study). Therefore the two cases seem incompatible. However, *Jean* has in mind cases where the government takes an initial unjustified position (including an unjustified prelitigation position of the agency involved) that forces the private party into litigation. In such cases the government cannot avoid liability for attorney's fees by reasonable behavior during the litigation. Myers v. Sullivan, 916 F.2d 659 (11th Cir. 1990), requires that the government establish that *all* of its positions were substantially justified—"it is not sufficient for the government to show that some of its earlier positions or arguments were valid." *Id.* at 666 n.5. *Cf.* Alizadeh v. Safeway Stores, Inc., 910 F.2d 234 (5th Cir. 1990) (attorney's fees awarded to ultimately successful defendant for whole course of litigation, including plaintiff's partially successful appeal of summary judgment, which resulted in a trial on the merits in which defendant prevailed).

555. *See Jean*, 110 S. Ct. at 2322.

556. 461 U.S. 424 (1983).

557. *See id.* at 437.

558. *See id.* at 435 ("no fee may be awarded for services on the unsuccessful claim").

C. *Rule 11 Sanctions Can Be Imposed Only Against the Attorney Who Signed the Pleading:* Pavelic & LeFlore v. Marvel Entertainment Group[559]

A complaint signed by attorney LeFlore alleged that documents had been forged by defendants. Later, LeFlore entered into a law partnership with Pavelic, and all court papers were signed on behalf of the partnership by LeFlore. The district court found that the forgery claim had no basis in fact and had not been investigated sufficiently; the court imposed a sanction in the amount of $100,000 against the partnership of Pavelic and LeFlore. The question in the Supreme Court was whether a rule 11 sanction could be imposed only against the attorney who signed the subject pleading, or whether the sanction could also be imposed against the law firm on whose behalf the attorney signed.[560]

Justice Scalia, writing for eight members of the Court, held that rule 11 authorizes sanctions against no attorney other than the lawyer or lawyers who actually sign court papers. Justice Scalia applied the plain meaning rule to rule 11: when the terms are clear, the judicial task is complete.[561] Rule 11 requires a court, when a paper is signed in violation of the rule, to "impose upon the person who signed it" a sanction.[562] Justice Scalia admitted that the term "the person who signed it" could be read in several ways. He asserted, however, that when rule 11 is read in toto, the plain meaning of the rule is to impose liability only on the individual who signed the court paper. The Court noted that rule 11 begins with a requirement of individual signature, and then discusses the import of that

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559. 110 S. Ct. 456 (1989).

560. *See id.* at 457.

561. *See id.* at 458-59. *See* Rubin v. United States, 449 U.S. 424, 430 (1981) (inquiry normally complete when terms of statute are unambiguous).

562. FED. R. CIV. P. 11. Rule 11 provides in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id. See Pavelic & LeFlore, 110 S. Ct. at 458.

signature (that the signer has read the pleading and certifies that it is well-grounded). Since the requirement of signature is imposed upon an individual attorney, the plain meaning of the rule is that the consequences of the signature run to that individual only.[563]

The Court rejected the defendants' reliance on traditional principles of agency. According to Justice Scalia, rule 11 by its terms departs from traditional principles of agency such as delegability. Since the rule establishes a nondelegable duty, it was reasonable to expect that punishment is authorized only of the party upon whom the duty is placed.[564]

The Court also rejected the defendants' policy arguments that law firm liability would create incentives for internal monitoring within the firm. Justice Scalia stated that such policy could not overcome the plain meaning of the rule. Moreover, one could also articulate a proper policy behind holding only the signing attorney responsible. In this way, it would be brought home to the attorney that he alone is on the hook—he will not be saved by a deep pocket law firm. According to Justice Scalia, such a policy is "not so unthinkable" as to require a reading of the rule that is inconsistent with its plain meaning.[565]

Justice Marshall dissented, contending that the majority's reading of rule 11 was unnecessarily restrictive of trial court discretion. He argued that the prohibition against holding law firms accountable unwisely tied the hands of district judges, who must fashion the penalty to fit the particular case.[566] Justice Marshall argued that the majority's construction of rule 11 was not the only possible one, and thus that the Court was not warranted in taking shelter under the plain meaning rule. In the passages of the rule that the majority found so critical, the rule uses the term "signer"; yet in the sanction clause, the rule uses the term "the person who signed." This discrepancy could be fairly read to mean that the term "person" who signed could refer to an entity of which the "signer" was a part.[567]

Implications of Pavelic & LeFlore.—*Pavelic & LeFlore* is another example of an application of the plain meaning rule, even where the meaning of a rule is not so plain. Despite the fact that language is rarely so exact as to give a plain meaning to anything, the Court

563. *See Pavelic & LeFlore*, 110 S. Ct. at 458.
564. *See id.* at 459.
565. *See id.* at 460.
566. *See id.* at 460-61 (Marshall, J., dissenting).
567. *See id.*

appears fully prepared to accept any result that is arguably plain on the face of a statute.

Many of the subject papers were signed by LeFlore on behalf of the partnership.[568] Justice Scalia stated that a signature on behalf of a firm did not comply with the terms of rule 11 that an individual must sign the paper. Consequently, the signature was treated as one made by the individual attorney.[569] The Court affirmed what had been thought to be the better practice: the attorney should not sign for his firm, but should rather sign in his own name and on his own behalf, with the name of his firm underneath.[570]

Pavelic & LeFlore indicates that the predominant intent of rule 11 is to require personal responsibility of the attorney. However, it must be remembered that the responsibility imposed by rule 11 relates only to misconduct associated with the signing of a court paper.[571] Misconduct that is not associated with the signing of court papers must be dealt with by other methods.[572]

D. Sanctions Can Be Imposed After Voluntary Dismissal; Deferential Standard of Review Required for Rule 11 Sanctions; and Rule 11 Does Not Authorize an Award of Attorneys' Fees Incurred on Appeal of a Rule 11 Award: Cooter & Gell v. Hartmarx Corp.[573]

Cooter & Gell filed a pleading on behalf of a client, alleging that defendants engaged in a nationwide conspiracy to fix prices through an exclusive retail agent policy. The factual investigation behind this claim consisted of calling retail stores in four eastern cities, from which Cooter & Gell concluded that one of the defendants' products was sold in only one retail store per city. Defendants moved to dismiss and moved for sanctions under rule 11. Five

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568. *See id.* at 457.

569. *See id.* at 459.

570. *See generally* G. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 5(E)(1) (1988 & Supp. 1990) (discussing vicarious liability for rule 11 violations).

571. *See, e.g.*, Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989) (Rule 11 "relates to papers filed in court by an attorney, not to questionable attorney conduct in general . . . . The focus of Rule 11, then, is narrow; it relates to a specific act—the signing, and to a specific time—the time of signing."); Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 114-15 (7th Cir. 1989) (rule 11 award reversed where it was issued to compensate a party for all attorneys' fees incurred throughout a litigation; remanded for consideration of which costs were attributable to pleadings, motions, or other papers).

572. *See* Chambers v. Nasco, Inc. 111 S. Ct. 2123 (1991) (federal court can exercise inherent authority to impose sanctions).

573. 110 S. Ct. 2447 (1990).

months after the complaint was filed, Cooter & Gell filed a notice of voluntary dismissal of the complaint under federal rule 41(a)(1)(i).[574] More than three years after this, the district court granted defendants' motion for rule 11 sanctions, holding that Cooter & Gell's factual investigation was grossly inadequate.[575] Cooter & Gell appealed the sanction, and the court of appeals affirmed. In addition, the court of appeals held that a party who successfully defends a rule 11 award is entitled to attorney's fees incurred on the appeal, even if the appeal itself is not frivolous.[576]

In the Supreme Court, there were three issues for decision:

1. Whether a voluntary dismissal under rule 41 deprived the district court of jurisdiction to impose a rule 11 sanction.[577] Justice O'Connor, writing for eight members of the Court,[578] held that the district court retained the power to impose a rule 11 sanction even after a voluntary dismissal.

2. Whether the court of appeals erred in applying a deferential standard of review to the district court's determination that Cooter & Gell's pleading was not warranted by existing law. Justice O'Connor, writing for a unanimous Court, held that an appellate court must apply a deferential abuse of discretion standard to all aspects of a district court's rule 11 determination.[579]

3. Whether rule 11 authorized reimbursement for attorney's fees expended on appeal to defend a rule 11 award. Justice O'Connor's opinion for a unanimous Court held that rule 11 did not apply to any expenses incurred on appeal.[580]

Justice O'Connor began her discussion by noting the predomi-

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574. *See id.* at 2452; FED. R. CIV. P. 41.

575. *See id.* Even though the firm of Cooter & Gell signed a pleading that alleged a nationwide conspiracy, their investigation was limited to four eastern cities. *Id.* at 2452-53. And even as to those cities, there was no indication from the investigation that one of the defendants was engaged in an exclusive retail agent policy. *Id.* For a thorough discussion of what constitutes an adequate factual investigation, see Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 218-20 (1988).

576. *See Cooter & Gell*, 110 S. Ct. at 2453. The rule 11 sanction was imposed against the partnership of Cooter & Gell. While this was inconsistent with the personal liability mandated by rule 11 (*see supra* notes 563-565 and accompanying text), that issue was not raised by the partnership, and consequently the Court did not address it.

577. *Cooter & Gell*, 110 S. Ct. at 2454-55.

578. *See id.* at 2463-64 (Stevens, J., concurring in part and dissenting in part) (agreeing that the district court retains jurisdiction to decide collateral issues after a voluntary dismissal, but asserting that allowing sanctions after plaintiff has voluntarily dismissed a complaint pursuant to rule 41(a)(1) has "the unfortunate consequences of encouraging the filing of sanction motions and discouraging voluntary dismissals").

579. *See id.* at 2457-61.

580. *See id.* at 2463.

nant policy behind amended rule 11, as evidenced by the defects in the old rule. She concluded that the central purpose of rule 11 is to deter baseless filings in district court, so as to guarantee efficiency and justice in the federal courts.[581] Justice O'Connor saw the disadvantage of the rule, namely that it has a tendency to "spawn satellite litigation and chill vigorous advocacy."[582] However, these problems are outweighed by the goal of the rule to deter frivolous filings; and therefore any interpretation of rule 11 must be in accord with the central goal of deterrence.[583]

The Court found that the dismissal of the antitrust complaint under rule 41(a)(1)(i) did not deprive the district court of the jurisdiction to award attorney's fees.[584] Under rule 41, a plaintiff is entitled to a nonsuit as a matter of right if a notice of dismissal is filed before the filing of an answer or a motion for summary judgment, so long as there has been no prior dismissal on the same cause of action. The purpose of rule 41(a) is to allow the plaintiff to terminate the case at an early stage, but on the other hand to limit the abuse and harassment that flowed from prior law, which granted an automatic right to voluntary dismissal up until the entry of verdict.[585]

Justice O'Connor held that rule 41's provision for a dismissal without prejudice was not inconsistent with application of rule 11 sanctions after a dismissal. Both rules are aimed at curbing abuses of the judicial system. The Court further reasoned that a rule 11 violation is complete upon the filing of the violative paper; therefore, the violation is not expunged by a voluntary dismissal.[586] The Court also found it well-established that collateral issues could be considered after an action was dismissed on the merits, including issues such as attorney's fees, costs, and contempt. Like these collateral issues, a rule 11 sanction is not a judgment on the merits; therefore, it may be made after the suit has been terminated without prejudice.[587]

Cooter & Gell argued that a rule 11 sanction was tantamount to a judgment on the merits, inconsistent with rule 41(a), because the district court's imposition of a sanction would mean that the under-

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581. *See id.* at 2454.

582. *Id.* For a discussion of these disadvantages of rule 11, see Vairo, *supra* note 575.

583. *See Cooter & Gell*, 110 S. Ct. at 2454.

584. *See id.* at 2457.

585. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2363, at 152 (1971).

586. *See Cooter & Gell*, 110 S. Ct. at 2457.

587. *See id.* at 2455-56.

lying lawsuit lacked sufficient factual or legal basis.[588] Justice O'Connor responded that a rule 11 sanction would not be preclusive on the merits. A complaint could be refiled despite the rule 11 sanction.[589] This argument is unpersuasive as a pragmatic matter, however. A party who has suffered a rule 11 sanction after a voluntary dismissal would be loath to refile and risk another, perhaps greater, sanction.[590]

Justice Stevens, concurring in part and dissenting in part, argued that a rule 41(a) dismissal by its terms poses no burden on the efficiency of the civil justice system, since it must be made before defendant answers or makes a summary judgment motion.[591] The majority, however, found harm to the system even at this early stage. According to Justice O'Connor, a "[b]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering rule 11's concerns has already occurred."[592] Obviously, the Court is very sensitive, probably over-sensitive, to the problems created by baseless filings. While the majority's view does give rule 11 significant deterrent effect, there must be some limits to deterrence: execution of the attorney would also give rule 11 deterrent effect, but few argue that such a sanction should be appropriate.

For its second argument, Cooter & Gell contended that the court of appeals did not apply a sufficiently rigorous standard of review to the district court's rule 11 sanction. Justice O'Connor explained that there are three different types of issues presented on a rule 11 appellate review: 1. Factual questions concerning the extent of the attorney's pre-filing inquiry and factual basis; 2. Legal issues concerning whether a filing is warranted by existing law or a good faith argument for changing the law; and 3. Whether the district court imposed an appropriate sanction.[593] While noting the disarray among the circuit courts as to the appropriate standard of review for rule 11 sanctions, Justice O'Connor stated that "the scope of

588. *See id.*

589. *See id.* at 2456.

590. Of course, the district court could preclude refiling as an appropriate sanction under rule 11. *Id.* However, this would not be a consequence of the dismissal without prejudice, nor a term or condition placed upon the dismissal. *Id.* Accordingly, the Court found that, assuming preclusion of litigation was an appropriate rule 11 sanction, it would not violate the "without prejudice" conditions of rule 41(a). *Id.*

591. *See id.* at 2464 (Stevens, J., concurring in part and dissenting in part).

592. *Id.* at 2457.

593. *See id.*

actual disagreement is narrow."[594] On the first issue of factual inquiry, appellate courts must and do review the lower court's findings under a deferential standard. Whether that deferential standard is phrased as "clearly erroneous" or "abuse of discretion" is immaterial, since where factual findings are concerned, the two standards of review are "indistinguishable." A court of appeals can and should find an abuse of discretion in making a factual finding that was clearly erroneous.[595]

Likewise, the issue of whether the sanction itself was appropriate must be reviewed deferentially, since rule 11 by its terms requires the district court to impose an "appropriate" sanction. So the disagreement as to the standard of review deals with the second issue: whether the appellate court must defer to the lower court's legal conclusions in rule 11 proceedings, or whether legal questions must be reviewed de novo.[596]

Justice O'Connor found that a deferential standard of review should be applied even to legal questions. She first noted that the distinction between legal and factual issues was unclear at best; ordinarily, factual and legal issues are completely intertwined. Justice O'Connor found an analogy to negligence determinations, which are generally reviewed deferentially.[597] Of course, this argument proves too much: it logically precludes all de novo review, since the legal and factual issues are presumably so hard to separate.

Justice O'Connor also relied heavily on *Pierce v. Underwood*[598] in holding that an abuse of discretion standard should be applied to all aspects of a rule 11 determination.[599] In *Pierce*, the Court held that the district court's determination under the Equal Access to Justice Act[600] of whether the position of the United States was "substantially justified" should be reviewed only for an abuse of discretion.[601] According to the Court, two considerations found important in *Pierce* were also applicable to review of rule 11 sanctions: 1. Deference is owed to the judge who was best positioned to rule on the issue; when the issue substantially depends on factual considerations, the district court is better positioned to make the

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594. *Id.* at 2758.
595. *See id.*
596. *See id.*
597. *Id.* at 2458-59. *See* McAllister v. United States, 348 U.S. 19, 20-22 (1954) (reviewing district court's findings of negligence under the clearly erroneous standard).
598. 487 U.S. 552 (1988).
599. *See Cooter & Gell*, 110 S. Ct. at 2459-60.
600. 28 U.S.C. § 2412(d) (1988).
601. *See Pierce*, 487 U.S. at 560-61.

determination.[602] 2. Review of legal issues de novo would require appellate time and energy not to determine what the law is, but what the attorney could plausibly have thought the law to be; such a ruling will not result in clarification of the law, except in the most indirect way.[603]

Finally, the Court stated that the deterrence policy of rule 11 would be furthered by an across-the-board deferential review. Deference to district judges will enhance their ability to control the litigants before them, and will also discourage the pursuit of marginal appeals.[604]

As to whether Cooter & Gell could be held liable for the defendants' expenditure of attorneys' fees in defense of the rule 11 order, the Court found that rule 11 by its terms did not apply to appellate proceedings. Of course it is true that "but for" the frivolous pleading, there would never have been a rule 11 sanction and never an appeal, and therefore the expenditure of fees on appeal is caused by the frivolous pleading in some remote sense. But the Court found that such remote causation could not be the basis of rule 11 liability; otherwise, expenses incurred because of a baseless pleading could be extended indefinitely. Justice O'Connor concluded that the expenses of appeal are "directly caused" by the district court's sanction and the appeal of that sanction, not by the initial filing.[605]

Justice O'Connor also reasoned that the defendants' view of rule 11 was inconsistent with rule 38 of the Federal Rules of Appellate Procedure, which allows an appellate court to award damages and costs for a frivolous appeal.[606] Under the defendants' view, rule 11 would provide for attorney's fees on appeal where rule 38 would not, i.e., to meritorious appeals of rule 11 sanctions. The Court properly concluded that there is no reason to discourage meritorious appeals of rule 11 orders, any more than there is reason to discourage meritorious appeals of other issues.[607] If the appeal itself is

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602. *See Cooter & Gell*, 110 S. Ct. at 2459-60.

603. *See id.* at 2460. Similar problems are found when the appellate court reviews the district court's determination whether a public official had qualified immunity in a civil action for deprivation of rights brought under 42 U.S.C. § 1983. In contrast to the ruling in *Cooter & Gell*, however, the Court has authorized de novo review of qualified immunity determinations, to the extent they turn on issues of law. *See* Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

604. *See Cooter & Gell*, 110 S. Ct. at 2460.

605. *See id.* at 2461.

606. *See* FED. R. APP. P. 38.

607. *See Cooter & Gell*, 110 S. Ct. at 2462; G. JOSEPH, *supra* note 570, § 5(a)(1)(b), at 5-6 (Supp. 1990) ("[A]s a matter of policy, nonfrivolous appeals of sanctions awards should

frivolous, then sanctions can be awarded under rule 38, just as with any other frivolous appeal.

Implications of Cooter & Gell.—The Court's adoption of an across-the-board abuse of discretion standard is somewhat inconsistent with some other cases of the term in which the Court sought to control the discretion of the district courts—such as *Spallone*[608] and *Jenkins*.[609] However, in those cases there was the factor of federalism and comity that was not present in *Cooter & Gell*. Moreover, the plain meaning of the rule indicates that an abuse of discretion standard should apply to at least some aspects of the district court's ruling. There was no such plain meaning at issue in *Spallone* or *Jenkins*.

In *Cooter & Gell*, the Court showed a strong interest in giving rule 11 significant deterrent effect, but at the same time the Court showed concern that rule 11 not be used as a vehicle for unlimited liability merely because a frivolous paper has been filed. Recovery must be limited to those expenses directly attributable to the frivolous filing. Lower courts have struggled with just which expenses are attributable to a frivolous filing, but it can be expected after *Cooter & Gell* that courts will take a stricter view of "direct causation."[610]

CONCLUSION

In general, the Court has shown a strong desire to control federal judicial activism by resort to principles of federalism, plain meaning, adherence to tradition, and deference to the legislature. There is every reason to think that the five-prong attack of controls on discretion, limits on judicial authority, preservation of federalism, enforcement of plain meaning, and simplification will continue in the future—not only in the area of federal civil practice, but in all areas of Supreme Court decisionmaking.

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not be deterred any more than other nonfrivolous appeals should be. On the contrary, given the unevenness with which Rule 11 is applied, this area is one in which appellate guidance is needed most.").

608. 110 S. Ct. 625 (1990).

609. 110 S. Ct. 1651 (1990).

610. *See, e.g.*, West v. West, 126 F.R.D. 82, 84 (N.D. Ga. 1989) (declining to award consequential damages allegedly due to the chilling effect that the complaint had on the proposed sale of the defendant's companies; consequential damages cannot be awarded due to (1) the lack of proximate causation, and (2) the chilling effect of unlimited liability); Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 114-15 (7th Cir. 1989) (rule 11 award reversed where it was issued to compensate a party for all attorney's fees incurred throughout a litigation; remand for consideration of which costs were attributable to pleadings, motions, or other papers). *See generally* G. JOSEPH, *supra* note 570, § 5(C) (noting the conflict in the courts concerning which expenses are caused by frivolous filings).